(6)

No. 92-409-CFH
Status: DECIDED

Title: Paul Delo, Superintendent, Potosi Correctional Center, Petitioner
v.
Frederick Lashley

Docketed:
September 3, 1992

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Jurgeson,Ronald L.

Counsel for respondent: Brown,William

Entry	Date	Note	Proceedings and Orders
1	Sep 3 1992	G	Petition for writ of certiorari filed.
2	Sep 3 1992		Appendix of petitioner Delo, Supt., etc. filed.
3	Oct 7 1992		DISTRIBUTED. October 30, 1992
4	Oct 16 1992	P	Response requested -- WHR. (Due November 16, 1992)
6	Nov 16 1992	X	Brief of respondent Frederick Lashley in opposition filed.
7	Nov 16 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Nov 18 1992		REDISTRIBUTED. December 4, 1992
9	Dec 7 1992		REDISTRIBUTED. December 11, 1992
11	Dec 18 1992		Record requested.
13	Dec 31 1992		Record filed.
		*	Proceedings from USCA/8 and District Court. (2 boxes)
12	Jan 4 1993		REDISTRIBUTED. January 8, 1993
15	Jan 11 1993		REDISTRIBUTED. January 15, 1993
17	Feb 16 1993		REDISTRIBUTED. February 19, 1993
19	Feb 22 1993		REDISTRIBUTED. February 26, 1993
21	Mar 1 1993		REDISTRIBUTED. March 5, 1993
22	Mar 8 1993		Motion of respondent for leave to proceed in forma pauperis GRANTED.
23	Mar 8 1993		Petition GRANTED. Judgment REVERSED. Dissenting opinion by Justice Stevens. Opinion per curiam.

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92-409

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No._____

In The
Supreme Court of the United States
October Term, 1992

PAUL DELO, SUPERINTENDENT
Potosi Correctional Center,
Petitioner,

v.

FREDERICK LASHLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE A STATE TRIAL COURT TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT PRESENTS NO AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION AND WHEN THE PENALTY PHASE INSTRUCTIONS AS A WHOLE ALLOW THE JURY TO CONSIDER AND GIVE EFFECT TO ANY MITIGATING CIRCUMSTANCE?

II.

WHETHER A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED A HARMLESS ERROR WHEN REVIEWED IN A FEDERAL HABEAS CORPUS ACTION?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

FREDERICK LASHLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit reversing and remanding respondent's sentence of death is reported at 957 F.2d 1495 (8th Cir. 1992). The opinion of the Court is reprinted in slip opinion form in the appendix (Appendix -- hereinafter "App." -- at A-1 - A-21). The judgment and orders of the United States District Court for the Eastern District of Missouri, Eastern Division are not reported. The various opinions of the District Court are included in the appendix (App. A-24, A-25 - A-27, A-28 - A-29, A-30 - A-31).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on March 4, 1992 (App. A-1). Superintendent Delo's petition for rehearing or rehearing en

banc was denied by the Court of Appeals on July 1, 1992 (App. A-22). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 13.1, the present petition for a writ of certiorari was required to be filed by petitioner[1] within 90 days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Revised Statute, §565.012 (1982 Supplement)

---

[1] Current petitioner Paul K. Delo is respondent's custodian since respondent's transfer from the Missouri State Penitentiary in Jefferson City, Missouri, to the Potosi Correctional Center in Mineral Point, Missouri.

is reproduced in the appendix (App. A-78 - A-81).

STATEMENT OF THE CASE

Respondent, Frederick Lashley, was convicted of capital murder, §565.001, Missouri Revised Statute (1978) (Repealed October 1, 1984), for which he was sentenced to death by the Circuit Court of the City of St. Louis, Missouri. The circumstances surrounding respondent's crime were summarized by the Missouri Supreme Court on direct appeal.

> Defendant Frederick Lashley, 17, was convicted of the capital murder of his physically handicapped 55-year-old cousin and foster mother, Janie Tracy, while robbing her of $15. The punishment prescribed by the jury and approved by the trial court is death. We affirm.
>
> The victim lived alone in a downstairs apartment in the City of St. Louis. She had heart trouble, diabetes and a neuromuscular problem that caused her to limp and required her to use a walking cane. She had difficulty walking since she had undergone a brain operation a number of years ago. The operation had resulted in the removal of a portion of her skull on the left side of her head. Defendant had lived with and been cared for by Miss Tracy (and her mother) from the time he was two years of age until he was sixteen years old. He had been present on occasions when there had been discussions concerning the soft spot on Miss Tracy's head.
>
> On the night of April 9, 1981, Miss Tracy was visiting her sister, Mrs. Williams, who lived several blocks from the Tracy apartment. Sometime before 8:30 p.m., defendant entered

the apartment by climbing through the top of a window on the rear porch. He unscrewed the light bulb in the front room so that the light would not come on when the switch was turned on. His admitted purpose was to ambush Miss Tracy and take her money when she returned home. Defendant, armed with a cast iron skillet (and the jury could reasonably find he also had a butcher knife having a seven and one-half inch blade), waited in the dark in the bedroom adjacent to the front room.

Miss Tracy left her sister's home between 8:00 and 8:30 p.m., driving her car. In his confessions to the police, one of which was videotaped, defendant stated that when Miss Tracy entered the front door of the apartment she attempted to turn on the light. When the light did not come on she started into the room where defendant was waiting. As she reached for the light switch he struck her in the head with the iron skillet, breaking it into two pieces. He said she fell and began screaming and he put his hand over her mouth. When asked where the knife came from the defendant stated:

> Off the floor. It was on-well, really it was on the floor. That's-I mean, you know, I just see the knife and then I grabbed it, you know. And then she had it in her hand. We both had it. And then I finally got it-got it back and then that's when I stuck her with it.

Defendant took $15 and car keys from Miss Tracy's purse, locked the front door on the way out of the apartment, and drove off in the victim's automobile. He was apprehended while

driving the stolen vehicle shortly after midnight.

An upstairs neighbor of Miss Tracy, Mrs. Ali, 81, had heard screams followed by something which sounded "like a fall" from the downstairs apartment. She telephoned the Tracy apartment and when she did not get an answer, called Mrs. Williams to come over and investigate. Mrs. Williams and her husband went to her sister's apartment shortly after 8:30 p.m. Mrs. Williams noticed her sister's car was not parked outside. She had a key to the apartment and upon entering it, saw her sister on the floor of the bedroom, bleeding about the head. She also saw a butcher knife near Miss Tracy and a broken skillet on the bedroom floor. Police and medical assistance were immediately summoned.

Hospital records showed Miss Tracy was comatose and brain dead when she arrived at the hospital. She had a cut on her head above the right ear, "defense" knife cuts on her fingers, and a one-inch incision above her left ear where the knife entered her skull through the soft spot and penetrated her brain. This stab wound caused her death approximately 48 hours later.

Defendant did not testify at trial but his written and videotaped confessions were introduced by the State. In both he admitted striking the defenseless woman with the skillet with sufficient force to knock her down and then plunged the butcher knife into her head.

State v. Lashley, 667 S.W.2d 712, 713-715 (Mo. banc) (footnote omitted), *cert. denied*, 469 U.S. 873 (1983). On the basis of the evidence introduced at trial, the jury found respondent guilty of capital murder. In a separate penalty phase of the trial, the

same jury found the existence of a statutory aggravating circumstance: to-wit, that the defendant murdered Janie Tracy for the purpose of receiving money or any other thing of monetary value. The jury assessed capital punishment as respondent's penalty. The Missouri Supreme Court upheld the conviction and sentence on direct appeal. *Id.*

Respondent Lashley then sought post-conviction relief pursuant to former Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). Respondent's post-conviction motion was denied by the Circuit Court of the City of St. Louis, Missouri. The appeal to the Missouri Court of Appeals was denied. ***Lashley v. State***, 721 S.W.2d 31 (Mo.App., E.D. 1986), *cert. denied*, 481 U.S. 1024 (1987).

Lashley then began the federal attack upon his conviction and sentence. Petitioner filed a petition for a writ of habeas corpus on May 14, 1987, in the United States District Court for the Eastern District of Missouri (App. A-64 - A-77). After several stages of litigation, United States District Judge Edward L. Filippine denied each allegation contained in respondent's petition (App. A-24, A-25 - A-27, A-28 - A-29, A-30 - A-31). The District Court granted a certificate of probable cause for appeal.

On appeal, the United States Court of Appeals for the Eighth Circuit found, in a two-one decision, that respondent was denied a protection of the Eighth Amendment because the Missouri trial court refused to give a mitigating-circumstance instruction that had been requested. ***Lashley v. Armontrout***, 957 F.2d 1495, 1501-1502 (8th Cir. 1992) (App. A-1 - A-21).

Petitioner's petition for rehearing or rehearing en banc was denied by the court of appeals on July 1, 1992 (App. A-22). The present petition for a writ of certiorari ensues.

ARGUMENT

I.

A STATE TRIAL COURT HAS NO CONSTITUTIONAL DUTY TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT PRESENTS NO AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION AND WHEN THE PENALTY PHASE INSTRUCTIONS AS A WHOLE ALLOW THE JURY TO CONSIDER AND GIVE EFFECT TO ANY MITIGATING CIRCUMSTANCE.

A St. Louis City, Missouri jury convicted respondent Lashley of capital murder. Respondent was then denied relief by the Supreme Court of Missouri on direct appeal, the Circuit Court of the City of St. Louis in a post-conviction proceeding, the Missouri Court of Appeals for the Eastern District on post-conviction appeal, and the United States District Court in a federal habeas corpus action. On the appeal from the district court's decision, a three-judge panel of the United States Court of Appeals for the Eighth Circuit -- in a two-to-one vote -- overturned the sentence on the basis of a perceived Eighth Amendment violation during the penalty phase of the criminal proceeding.

The Court of Appeals ruled that it was an error of constitutional dimension for the Missouri trial court to have refused to give a mitigating-circumstance instruction requested by respondent. The requested instruction would have told the jury they could consider as a mitigating factor that the defendant "has no significant history of prior criminal activity." §565.012.3(1), Missouri Revised Statutes (Supp. 1982). ***Lashley***

v. Armontrout, 957 F.2d 1495, 1501 (8th Cir. 1992). Two judges of the panel held that Eighth Amendment principles, as defined in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), "obligated the Missouri trial court to give the requested instruction, if it was warranted by the evidence." *Lashley*, 957 F.2d at 1501. The two-judge majority went on to hold that under the facts of respondent's case, the evidence warranted the instruction. *Id.*, at 1501-1502.

The decision of the two-judge majority conflicts with this Court's Eighth Amendment jurisprudence, overlooks Missouri law governing the procedures applied in capital cases, and creates a direct conflict among federal Circuit Courts of Appeal. These serious errors by the Court of Appeals provide sufficient reasons for this Court to exercise its power of discretionary review and to grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Supreme Court Rule 10.1(a), 10.1(c). The analysis of the Court of Appeals in this case makes it clear that further guidance is needed from this Court as to the applicability of the Eighth Amendment to questions relating to state procedural rules concerning the jury's consideration of potentially mitigating evidence.

A. **The Eighth Amendment (as applied to the states through the Fourteenth Amendment) does not require submission of an instruction listing a specific statutory mitigating circumstance unless the criminal defendant provides support for the instruction with competent evidence.**

In its ruling, the Court of Appeals has inappropriately blended Eighth Amendment concepts with Missouri procedural rules. The panel held:

> *Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it. The evidence before the jury in this case presented a blank slate. As far as the jury was concerned, Lashley had no significant history of prior criminal activity, and, therefore, he was entitled to have the jury consider that fact as a mitigating circumstance. The trial judge's failure to give the requested instruction under these circumstances violated the defendant's Eighth Amendment rights as expressed in *Lockett*.

Lashley, 957 F.2d at 1501. To be sure, in *Lockett* this Court held:

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant *proffers* as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. at 604 (emphasis added, footnote omitted). Superintendent Delo does not dispute that holding. But *Lockett* has not been the last word on mitigating circumstances; it does not even address the separate question of jury instructions. The court of appeal's failure even to recognize this Court's subsequent, more applicable, decisions reflects a possible methodological flaw in the opinion mandating review by this Court.

Contrary to the court of appeals' opinion, *Lockett* does not mandate instructing on a mitigating factor that has not been supported by *evidence* presented by the defendant. This Court has determined that the instructions must allow the sentencer to consider and give effect to any mitigating "evidence" presented by the defendant. *See Penry v. Lynaugh*, 492 U.S. 302, 318-319 (1989). Apparently this inference is not so clear as to

be understood by the Eighth Circuit in this case.[2] Superintendent Delo understands ***Penry*** as extending only to its facts -- a situation in which the defendant has presented "evidence" to support a mitigating factor.

This Court should now, therefore, specifically address the question of whether the jury must be given an instruction on statutory mitigating evidence when the instruction is not supported with affirmative evidence having been presented during the criminal trial or sentencing proceeding.[3] This issue is one of importance throughout the country as several states use statutes and instruction rulings similar to the ones at issue from Missouri. Supreme Court Rule 10.1(c).

The Court has expressly held that "***Lockett*** does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." ***Franklin v. Lynaugh***, 487 U.S. 164, 181 (1988) (plurality opinion). "There is no . . . constitutional requirement of unfettered sentencing discretion in the jury and states are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" ***Walton v. Arizona***, 110 S.Ct. 3047, 3056 (1990), *quoting*, ***Boyde v. California***, 110 S.Ct. 1190, 1196 (1990). The Court has also noted that "the Constitution does not require a State to adopt specific standards for instructing the jury in its

[2] Recently certiorari review was granted in ***Graham v. Collins***, 950 F.2d 1009 (5th Cir.), *cert. granted*, 112 S.Ct. 2937 (1992). This action indicates the ***Penry*** decision is unclear to the circuit courts of appeal.

[3] The Court has recognized that it is not constitutionally impermissible to require a defendant to bear the burden of non-persuasion so long as the state is not relieved of proving any element of the offense or the existence of necessary aggravating circumstances. ***Walton v. Arizona***, 110 S.Ct. 3047, 3055 (1990). Here, respondent did not meet the burden of Missouri law which required the introduction of *some* evidence to support his requested mitigating circumstance.

consideration of aggravating and mitigating circumstances." ***Zant v. Stephens***, 462 U.S. 862, 890 (1983); *see also id.*, at 875, n. 13.

As Judge Fagg noted in his dissenting opinion, ". . . the court mistakenly concludes ***Lockett*** obligated the state trial judge to give Lashley's requested mitigating circumstance instruction even though the record did not contain a shred of evidence to support it." ***Lashley***, 957 F.2d at 1503 (Fagg, J., dissenting). Judge Fagg also correctly discussed the interplay between Missouri's procedural rules and the Eighth Amendment dictates discussed in ***Lockett***, *supra*; ***Eddings v. Oklahoma***, 455 U.S. 104 (1982); and ***Penry v. Lynaugh***, 492 U.S. 302 (1989).

The charge to the jury in respondent Lashley's case did allow the jurors to consider and give effect to *any* evidence that might be considered mitigating. Missouri Approved Instruction - Criminal, Second Edition (MAI-CR 2d) 15.44 and 15.46 (*See* App. A-102 - A-105, A-106). In addition to specifically listing all statutory mitigating circumstances that are supported with some evidence, Missouri procedure requires that the jury be instructed that they can consider "any circumstances which you find from the evidence in extenuation or mitigation of punishment." MAI-CR 2d 15.44 and Note on Use 5 (App. A-103, A-105).[4]

It has been recognized that sentencing jurisdictions may require that mitigating circumstance instructions be supported by some evidence. The dissent states the rule, correctly, as being that "[d]ue process requires that state trial courts give mitigating circumstance instructions only when the evidence warrants those

[4] If, after the jury has considered and given effect to any evidence in extenuation or mitigation of punishment, the aggravating circumstances are found to outweigh all mitigation factors, the jury is not compelled to return a sentence of death. The jury is provided with a "life option" instruction under Missouri procedure. MAI-CR 2d 15.46 (App. A-106).

instructions." ***Lashley***, 957 F.2d at 1502. In support of this rule the reader is referred to ***Hopper v. Evans***, 456 U.S. 605, 611 (1982). *Id*. In ***Hopper***, this Court addressed the analogous issue of a lesser-included-offense instruction, and held (in pertinent part) that "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction" (emphasis in original). What unites the rule cited from ***Hopper*** and the point Judge Fagg made in the instant case is that the giving of jury instructions--even in a capital case--is to be decided according to the facts of the case and the law of the sentencing jurisdiction.[5]

Assuming that the record before the jury did present a "blank slate" relating to Lashley's prior criminal history, the Eighth Amendment question becomes whether "no" evidence should be considered as a mitigating factor (thereby placing the burden on the state to disprove its existence) or whether the defendant should have an affirmative burden, as state law provides, to present *something* to support the instruction. With this case the Court can fashion a specific rule to be applied in federal review of state-court capital punishment convictions and sentences.

Under Missouri procedure, an instruction may be given only if it is supported by the evidence. ***State v. Battle***, 661 S.W.2d 487, 492 (Mo. banc 1983), *cert. denied*, 466 U.S. 993 (1984); ***State v. Daugherty***, 631 S.W.2d 637, 639 (Mo. 1982). In fact, the Notes on Use to the Missouri instruction on this issue (MAI-CR 2d 15.44) (App. A-102 - A-105) specifically authorizes submission of the instruction only "if there is

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[5] It is evident that confusion exists as to whether the question before the Court of Appeals was one based on due process of the Fourteenth Amendment or one based upon Eighth Amendment principles. The confusion becomes even more evident when review is undertaken for harmless error. *See infra* Argument II. This case provides an excellent opportunity for this Court to clarify the law.

evidence supporting" statutory mitigating circumstances or any mitigating circumstance or circumstances "authorized by law." *See* MAI-CR 2d 15.44, Notes on Use 3, 4 (App. A-103 - A-104). In deciding respondent's issue on direct appeal, the Missouri Supreme Court found that there was "no evidence to support the statutory mitigating circumstance . . .." ***State v. Lashley***, 667 S.W.2d 712, 715-716 (Mo. banc), *cert. denied*, 469 U.S. 873 (1984).

Respondent Lashley was not prohibited from presenting any potential mitigating evidence to the jury in this case. Instead, Lashley made a reasonable strategic decision to forego presentation of evidence on his claimed lack of criminal history and thereby alleviate any possible rebuttal by the prosecution involving, as one Missouri Supreme Court judge noted, "other felonies committed by the defendant while an adult . . .." ***State v. Lashley***, 667 S.W.2d at 717 (Blackmar, J., concurring in part and dissenting in part).[6] The choice made by respondent, however, does not violate the precepts of ***Lockett v. Ohio***, 438 U.S. at 604; *see also* ***Eddings v. Oklahoma***, 455 U.S. at 112; ***Penry v. Lynaugh***, *supra*.

As the dissent correctly points out in discussing the issue here, this Court has held "the constitution is not violated when a state requires capital defendants to bear [the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases]." ***Lashley***, 957 F.2d at 1503 (Fagg, J., dissenting opinion), *citing*, ***Walton v. Arizona***, 110 S.Ct. 3047, 3055 (1990) (plurality); *see also id*., 110 S.Ct. at 3066-3068 (Scalia, J., concurring).

Under this Court's previous rulings on Eighth

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[6] The majority of the Missouri Supreme Court also recognized that while respondent was "in custody for the present offense he told officers he had committed several felonies after attaining adult status." ***State v. Lashley***, 667 S.W.2d at 716.

Amendment issues, the majority in respondent's appeal proceeding has missed the mark. A writ of certiorari should issue to define application of the Eighth Amendment to jury instruction questions dealing with mitigation evidence.

B. **Because the Eighth Amendment contains no requirement concerning procedures for submitting instructions to the jury, this case should have been decided primarily on state-law grounds**.

Neither the Eighth Amendment nor any other source of federal law mandates the holding reached by the United States Court of Appeals. It is axiomatic that "federal habeas corpus relief does not lie for errors of state law." ***Estelle v. McGuire***, 112 S.Ct. 475, 480 (1991), *quoting*, ***Lewis v. Jeffers***, 110 S.Ct. 3092, 3102 (1990).

On surprisingly similar facts, the United States Court of Appeals for the Fourth Circuit has determined that the failure of a state trial court "to tell the jury that it could consider the defendant's clean criminal record as a mitigating factor . . ." would at most be ". . . an error of state law which is not cognizable by a federal court." ***Hutchins v. Garrison***, 724 F.2d 1425, 1436-1437 (4th Cir. 1983), *cert. denied, stay denied*, 464 U.S. 1065 (1984); *see also* ***Briley v. Bass***, 750 F.2d 1238, 1244 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985); ***Jones v. Murray***, 947 F.2d 1106, 1119-1120 and n. 11 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992).

Failing to give deference to the reasonable, good-faith decision of the Missouri Supreme Court in considering this allegation, the Court of Appeals has incorrectly decided this issue. Superintendent Delo is well aware of the fact this Court has recently attempted to address the question of "whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case." ***Wright v. West***, 112 S.Ct. 2482, 2486 (1992). Since the Court did not ultimately answer that question in ***Wright***, this case would

provide an excellent opportunity to further consider the issue.

As previously discussed, the Missouri Supreme Court engaged in an extensive and reasonable discussion of this allegation as it was presented on the direct appeal of respondent's judgment of conviction and sentence. ***State v. Lashley***, 667 S.W.2d at 715-716.[7] Certainly, it cannot be said that the Eighth Circuit is in any *better* position to decide this issue than were the judges of the Supreme Court of Missouri.[8]

It has been traditionally recognized that great deference to state court determinations will be given on issues relating to the existence of aggravating factors. ***Lewis v. Jeffers***, 110 S.Ct. at 3102. In ***Parker v. Dugger***, 111 S.Ct. 731 (1991), Justice White wrote that there should be no difference between the consideration of "state court conclusions regarding mitigating circumstances as opposed to those regarding aggravating factors." *Id*. at 742 (White, J., dissenting). Except for the fact that the present case concerns consideration of mitigating evidence and not aggravating factors, the issue here is not substantially different than the one decided in ***Wainwright v. Goode***, 464 U.S. 78 (1983).

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[7]Again, as Judge Blackmar noted in his separate opinion, "[t]here are indications in the record before us of other felonies committed by the defendant while an adult ... ." *Id*. at 717 (Blackmar, J., concurring in part, dissenting in part). Lashley could not gather even one vote from the Missouri Supreme Court to support his position that there was evidence to support the submission of his requested instruction. That reasonable, good-faith decision of the Supreme Court of Missouri should have been given deference in the federal courts.

[8] In fact, Chief Judge Richard S. Arnold, the author of the majority opinion in this case, has recently remarked in another capital punishment case from the State of Missouri that "for our purposes, 'state law' is what the Supreme Court of Missouri says it is." ***Byrd v. Delo***, 942 F.2d 1226, 1232 (8th Cir.), *stay denied*, 112 S.Ct. 17 (1991).

In ***Goode***, this Court determined that the Eleventh Circuit had exceeded its habeas corpus authority in finding an Eighth Amendment violation when an aggravating circumstance claim had been fully, and arguably correctly, considered by the Florida Supreme Court. The decision found that the issue was either one of state law not reviewable in a collateral proceeding, ***Goode***, 464 U.S. at 83-84, or was an issue of historical fact which should have been given deference under 28 U.S.C. §2254(d). *Id.*, at 84-87.

While the concept of a federal court giving deference on a mixed issue of law and fact is quite different than deciding a purely state law claim, it is important to recognize that the *procedures* used to provide Eighth Amendment protection in state trials are set by the individual States. As Justice Scalia properly noted in ***Walton v. Arizona***, the Eighth Amendment "does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment." ***Walton***, 110 S.Ct. at 3066 (Scalia, J., concurring); *see also* ***Parker v. Dugger***, 111 S.Ct. at 743 (White, J., dissenting). When the state's procedures do not preclude consideration of mitigating evidence, the state court's determination on the Eighth Amendment question should be entitled to deference. This Court should provide an answer to the question left open in ***Wright*** by granting certiorari in this case.

C. **The Eighth Circuit in this opinion has created a direct conflict between the opinion in this case and the Hutchins decision from the Fourth Circuit.**

In ***Hutchins v. Garrison***, 724 F.2d at 1436-1437, the United States Court of Appeals for the Fourth Circuit held the failure of a state trial court "to tell the jury that it could consider the defendant's clean criminal record as a mitigating factor . . ." would at most be ". . . an error of state law which is not cognizable by a federal court." *Id.* The federal habeas corpus action in the analogous capital case from the State of North Carolina presented nearly the same question for

determination decided by the Eighth Circuit here.

In ***Hutchins***, the North Carolina Supreme Court phrased the inmate's issue on direct appeal as being "that the trial court erred in failing to submit the mitigating circumstance that defendant did not have a significant history of prior criminal activity." ***State v. Hutchins***, 303 N.C. 321, 356, 279 S.E.2d 788, 809 (1981). Undeniably, the question in ***Hutchins*** presents substantially the same issue for decision as confronted the Missouri Supreme Court in 1984.[9]

The North Carolina Supreme Court found that "[s]ince defendant did not go forward with evidence in this regard, nor was there any evidence introduced by the state on this point, the trial court was not obligated to instruct the jury on this mitigating circumstance on its own motion." ***State v. Hutchins***, 303 N.C. at 356, 279 S.E.2d at 809. The ruling from North Carolina is certainly in line with the decision by the Missouri Supreme Court.

> Defendant's position is refuted by the italized [sic] language contained in MAI-CR 2d 15.44 which specifically states statutory mitigating circumstances are to be supported by the evidence. ... There being no evidence to support the statutory mitigating circumstance, the trial court correctly refused defendant's proffered instruction.

State v. Lashley, 667 S.W.2d at 715-716.

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[9] In the present case, the Missouri Supreme Court wrote, "[d]efendant contends the court committed reversible error in refusing to give his tendered instruction on mitigating circumstances which included the mitigating circumstance of defendant having no significant history of prior criminal activities." ***State v. Lashley***, 667 S.W.2d at 715.

It would only make sense that when the highest courts of two states decide almost exactly the same issue in almost exactly the same way, the federal courts reviewing those issues would come to compatible results. In this instance they have not.[10] If a capital defendant has a right to a mitigation instruction in the absence of even a scintilla of evidence to support it, this windfall should be because this Court has found the Constitution of the United States requires it, not on account of the fortuity of committing his crime in the Eighth Circuit.

Missouri and North Carolina are not unique in their rule requiring a burden to be borne by the criminal defendant before mitigating evidence will be considered. *See* ***State v. Guzman***, 100 N.M. 756, 764, 676 P.2d 1321, 1329 (1984), *cert. denied*, 467 U.S. 1256 (1984); ***People v. Cornett***, 33 Cal.2d 33, 198 P.2d 877 (1945). *See generally* Ariz.Rev.Stat.Ann. § 13-703(C) (1991) ("[t]he burden of establishing the existence of the [mitigating] circumstances is on the defendant"); Cal. Penal Code §1105(a) (West Cum.Supp. 1992); Conn.Gen.Stat. § 53a-46a(c); Nev.Rev.Stat. §175.554.1 (1991); N.C.Gen.Stat. §15A-2000(b) (Michie 1988); 42 Pa.Cons.Stat.Ann. §9711(c)(1)(ii) (Cum.Supp. 1991); S.C.Code Ann. §16-3-20(C) (Law. Co-op. Cum. Supp. 1991); Tenn.Code Ann. §39-13-204(e) (1991).

This type of inconsistency cannot stand. Litigants in the states under the Eighth Circuit's jurisdiction now have a federal law hurdle to leap that does not stand in the way of states in the Fourth Circuit -- or, to Superintendent Delo's knowledge, in any other circuit.

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[10] The Fourth Circuit found the issue to be one of state law. ***Hutchins v. Garrison***, 724 F.2d at 1437. That result comports with this Court's recent decision in ***Estelle v. McGuire***, 112 S.Ct. at 481-484. *See* ***Wainwright v. Goode***, 464 U.S. at 382[1]. The Eighth Circuit found, though, that the issue was one of constitutional concern and, in fact, violative of the Eighth Amendment. ***Lashley v. Armontrout***, 957 F.2d at 1501-1502.

The decision of the Fourth Circuit in ***Hutchins*** makes it clear this issue is one of state law and not one subject to Eighth Amendment attacks. *See also* ***Wainwright v. Goode***, 464 U.S. at 83-87; ***Parker v. Dugger***, 111 S.Ct. at 741-743 (White, J., dissenting). The conflict between the opinion in this case and the Fourth Circuit decision in ***Hutchins v. Garrison***, 724 F.2d at 1436-1437, needs to be resolved by this Court. Supreme Court Rule 10.1(a).

Finally, this Court should grant certiorari review in this case to determine whether the decision of the Eighth Circuit "... breaks new ground or imposes a new obligation on the States or the Federal Government." ***Teague v. Lane***, 489 U.S. 288, 301 (1989). Assuming, *arguendo*, the Eighth Amendment does require what the court of appeals claims it does, the presumption is that the rule of constitutional law would not apply to Lashley's case.

Under nearly the same facts, the Fourth Circuit has held that the issue in this case is primarily one of state law. ***Hutchins v. Garrison***, 724 F.2d at 1436-1437. The conflicting -- and diametrically opposed -- opinion in the case at bar must be said to create a new rule of constitutional law under ***Teague***. Of course, as a new rule of law, it should not be applied to respondent's case which is on collateral appeal unless it fits within one of the very narrow exceptions from ***Teague***. ***Wright v. West***, 112 S.Ct. at 2500-2503 (Souter, J., concurring in judgment).

The result in this case is not the same as that reached by this Court in ***Penry v. Lynaugh***, 492 U.S. 302 (1989). In ***Penry***, the Court was confronted with a situation wherein the criminal defendant had presented evidence to support the giving of the instructions refused by the trial court. ***Penry***, 492 U.S. at 318-319. To extend ***Penry*** (or the Court's earlier Eighth Amendment cases such as ***Lockett*** and ***Eddings***) to include the facts of this case may be right (as two judges of the Eighth Circuit said) or wrong (as the dissenting judge and

Superintendent Delo say), but it is certainly "new." Unless the prisoner can show that his case falls within one of the two exceptions from ***Teague***, the Eighth Circuit panel's decision violates this Court's directions in ***Teague*** and its progeny.

This ***Teague*** issue should have prevented the court of appeals from addressing any constitutional issue in this case. This Court should accept discretionary review of this case to correct the ***Teague*** violation.[11]

Under the above arguments, it is clear that guidance needs to be given to the lower courts concerning application of Eighth Amendment principles to state court determinations and the interplay between the state's procedural rules and the federal constitutional requirements. This case provides the opportunity for such guidance.

[11] Superintendent Delo is cognizant of the fact respondent may reply that the ***Teague*** issue was not briefed in the district court or in the appellee's brief before the Eighth Circuit. The district court decision was rendered before this Court's opinion in ***Teague*** was handed down. After having prevailed at that level, petitioner felt the district court's decision was not only correct but properly based on prevailing theories of constitutional law not requiring a ***Teague*** defense to be needed in the court of appeals. ***Teague*** was raised in the petition for rehearing (App. A-55 - A-56, n. 1).

II.

A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED HARMLESS ERROR AND, IN THIS CASE, IS HARMLESS UNDER ANY STANDARD OF REVIEW.

Even assuming, *arguendo*, that the Eighth Circuit reached the proper decision under this Court's Eighth Amendment jurisprudence, the court's decision was incomplete. Assuming that the state trial court committed a constitutional violation by refusing to give the unsupported mitigating circumstance instruction concerning respondent Lashley's visionary lack of a significant history of prior criminal conduct, the Court should use this case as an opportunity to decide whether collateral relief will lie in the absence of consideration for harmless error of the assumed violation, and what standard such harmless error review should be undertaken.[12]

A. Eighth Amendment errors relating to the submission of mitigating-circumstance instructions should be subject to review under a harmless error analysis.

This Court "has recognized that most constitutional errors can be harmless." ***Arizona v. Fulminante***, 111 S.Ct. 1246, 1263 (1991). At least in the area of applying that rule to cases involving consideration of mitigation evidence by a jury, however, it is not clear what standard of review -- if any -- might be appropriate. In two of the first decisions on mitigation evidence after ***Woodson v. North Carolina***, 428 U.S. 280 (1976), the Court did not reach the issue of what the proper level of

[12] The Court has recently agreed to review a similar question from a Seventh Circuit case. ***Brecht v. Abrahamson***, 944 F.2d 1363 (7th Cir. 1991), *cert. granted*, 112 S.Ct. 2937 (1992). The question presented in that case deals with applying harmless error to a prophylactic rule.

scrutiny would be for deciding whether an error was harmless. *See* ***Lockett v. Ohio*** *supra*; ***Eddings v. Oklahoma***, *supra*. Later, in ***Skipper v. South Carolina***, 476 U.S. 2 (1986), the Court interpreted the State's argument that the mitigating evidence was cumulative to mean that the State was seeking application of some type of harmless error analysis. ***Skipper***, 476 U.S. at 9. The Court ruled that the exclusion of the mitigating evidence was "sufficiently prejudicial to constitute reversible error" because it was "reasonably likely that the exclusion of evidence ... may have affected the jury's decision." *Id*. It is unclear, however, whether the contrary is true, *i.e.*, that if the exclusion of mitigating evidence is not reasonably likely to have effected the jury's decision then the sentence is constitutionally permissible. The Court implicitly acknowledges this possible confusion as to the proper standard by concluding, "[t]hus, under *any* standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." *Id*. at 1673 (emphasis added).[13] As a result, the ***Skipper*** holding provides little guidance for cases similar to the one before the Court calling for a standard by which to analyze the impact of the failure to give a mitigating circumstance instruction.

The Court's opinion in ***Hitchcock v. Dugger***, 481 U.S. 391 (1987), confirms Superintendent Delo's understanding that an "absolute reversal" rule should *not* apply in the instant case. The case, though, did not spell out the specific standard to apply. Like ***Skipper***, that case involved the unconstitutional exclusion of mitigating evidence (rather than, as here, the refusal of an instruction which was unsupported by affirmative evidence) during the penalty phase. A unanimous Court intimated that such an error may be saved, stating that "[r]espondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing

[13] Also implicit in the Court's language in ***Skipper*** is the fact that under a different factual situation *some* type of harmlessness review would be possible.

judge." *Id*. at 399. In stating these exceptions as alternatives, the Court seems to acknowledge that reversal on the basis of such a constitutional error concerning mitigating circumstances may be avoided by either the "harmless error" doctrine[14] or what may best be characterized as a "due process" or "no prejudice" standard.[15]

At least one of the United States Courts of Appeals has interpreted the Court's opinion in ***Hitchcock*** to require the application of a harmless beyond a reasonable doubt analysis to unconstitutional exclusions of mitigating evidence. *See* ***Demps v. Dugger***, 874 F.2d 1385, 1389-1390 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1834 (1990), *citing*, ***Chapman v. California***, 386 U.S. 18 (1967). In ***Demps***, the Eleventh Circuit set forth the standard as follows:

> To be harmless in the ***Hitchcock*** context, the court must determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence.

Demps v. Dugger, 874 F.2d at 1390. Although this Court has not given such a succinct definition of any harmless error standard for the situation present in this case, the ***Demps*** standard can be reconciled with the various dicta from Supreme Court opinions. The Court should take this opportunity to provide definitive guidance on what standard is to be applied.

[14] *See generally* ***Chapman v. California***, 386 U.S. 18 (1967).

[15] *See* ***Hitchcock v. Dugger***, 481 U.S. at 399; *see e.g.* ***Hamilton v. Nix***, 809 F.2d 463, 470 (8th Cir.)(*en banc*), *cert. denied*, 483 U.S. 1023 (1987). In ***Hopper v. Evans***, 456 U.S. 605 (1982), this Court cited ***Chapman*** and applied what might be best characterized as a "no prejudice" test. *See* ***Rose v. Clark***, 478 U.S. 570, 577. The "no prejudice" analysis is similar to the review undertaken in the Eighth Circuit for due process claims. ***Hamilton v. Nix***, *supra*.

It is recognized that application of harmless error analysis to trial error is necessary to "preserve the 'principle that the central purpose of a criminal trial is to decide the factual questions of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" ***Arizona v. Fulminante***, 111 S.Ct. at 1264; *quoting* ***Delaware v. Van Arsdall***, 475 U.S. 673, 681 (1986); *see also* ***Rose v. Clark***, 478 U.S. 570, 578-579 (1986).

Furthermore, this Court has held that harmless error analysis is appropriate on habeas corpus review of Eighth Amendment challenges to penalty phase instructions dealing with aggravating factors, ***Clemmons v. Mississippi***, 110 S.Ct. 1441, 1451 (1990);[16] ***Sochor v. Florida***, 112 S.Ct. 2114 (1992).

As Justice White stated in ***Parker v. Dugger***, 111 S.Ct. 731, "I see no reason to differentiate between state court conclusions regarding mitigating circumstances as opposed to aggravating factors." *Id.* at 742 (White, J., dissenting). Similarly, there is no reason to apply a harmless error test to aggravating factors while requiring the harshness of an "automatic reversal" standard for mitigation questions. The importance of this issue needs to be addressed by this Court. Rule 10.1(c). A writ of certiorari should issue.

B. <u>Applying a harmless beyond a reasonable doubt standard to the facts in this case leaves no doubt that respondent's sentence was appropriate</u>.

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[16] In ***Clemmons***, the Court went so far as to state "[a]lthough the court applied the proper 'beyond a reasonable doubt' standard, *see* ***Chapman v. California***, 386 U.S. 18 (1967) . . .." ***Clemmons v. Mississippi***, 110 S.Ct. at 1451. In ***Fulminante***, the Court expressly recognized that ***Chapman*** had been applied in ***Clemmons*** to the issue of "unconstitutionally overbroad jury instructions at the sentencing stage of a capital case." ***Arizona v. Fulminante***, 111 S.Ct. at 1263.

Application of the harmless error rule to the case before the Court would leave the original jury verdict intact, because the mitigating circumstance instruction, even if given, would carry such little weight that it is certain beyond a reasonable doubt that the sentencer would have imposed the death sentence. Apart from the single missing factor in the mitigation instruction, the jury was fully instructed that they could consider any and all evidence in mitigation before arriving at the final punishment decision (App. A-102 - A-105). *Cf.* ***Rose v. Clark***, 478 U.S. at 579. The jury was also instructed they could return a sentence of life imprisonment even if they believed the aggravating factors were stronger in this case than the mitigating circumstances (App. A-106).

The assumed constitutional error in this case is harmless if Superintendent Delo can show beyond a reasonable doubt that submission of the requested instruction would not have influenced the jury to return a life sentence. *See* ***Demps v. Dugger***, 874 F.2d at 1390; *cf.* ***Hitchcock v. Dugger***, 481 U.S. at 398-399. Because the harmless error analysis deals directly with the process by which the death penalty is imposed, one must apply the harmless error rule with an understanding of the particular sentencing jurisdiction's procedures -- here, the procedures of the State of Missouri.

Missouri's capital sentencing scheme first requires the sentencer to decide whether one of the enumerated statutory aggravating circumstances is present. If one of those factors is present beyond a reasonable doubt, then the criminal defendant becomes "eligible"[17] for the death penalty. ***State v. Stokes***, 638 S.W.2d 715, 724 (Mo. banc 1982), *cert. denied*, 460 U.S. 1017 (1983). The jury then determines whether the aggravating circumstances outweigh the mitigating factors and in this determination the jury is allowed to consider all possible

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[17] *See* ***Sawyer v. Whitley***, 112 S.Ct. 2514, 2522-2523 and n. 15 (1992).

factors, not just those included in the jury instructions.

In Lashley's case, the jury found the existence, beyond a reasonable doubt, of one statutory aggravating circumstance: the jury found the murder was committed for pecuniary gain. ***State v. Lashley***, 667 S.W.2d at 714-715. Respondent was eligible for the death penalty upon that finding. The two-step process employed in Missouri allows a criminal defendant both to contest the existence of aggravating circumstances, and then -- if at least one is found -- to argue that the aggravating circumstance is outweighed by relevant mitigating factors.

The next question, then, was whether the jury's consideration of all evidence in aggravation and all evidence in mitigation would result in a finding that mitigating evidence outweighed aggravating evidence so as to *require* a life sentence. *See* MAI-CR 2d 15.44 (App. A-102 - A-105). Finally, even if the jury determined that respondent did not have sufficient evidence in mitigation to outweigh the viciousness of his crime, they were still not compelled to fix the punishment at death. MAI-CR 2d 15.46 (App. A-106).

In the penalty phase procedure as defined by Missouri law, it is clear the jury had ample opportunity to return a sentence of life imprisonment in this case. Respondent's argument was not that additional evidence in mitigation could have been presented to the jury; the argument was only that an *additional* factor should have been enumerated in the middle of an instruction that was given to the jury for consideration.

The court of appeals based its decision on a premise the record presented an evidentiary "blank slate." ***Lashley v. Armontrout***, 957 F.2d at 1501. The facts comprising this blank slate are not nearly as compelling for mitigation as the majority would lead one to believe. Respondent Lashley had only been an adult for thirty (30) days when he killed his cousin and guardian, Ms. Tracy. His lack of a significant prior criminal history only extended for one month as only offenses committed

as an adult are germane to this mitigating circumstance.

More importantly, the Supreme Court of Missouri noted that there was evidence the "[w]hile in custody for the present offense he told officers he had committed several felonies after attaining adult status." ***State v. Lashley***, 667 S.W.2d at 716. Even if this evidence was not before the jury in the guilt phase of the trial, *see* ***State v. Lashley***, 667 S.W.2d at 717 (Blackmar, dissenting), the record could easily have been made to include this information if the prosecution felt Lashley would otherwise have the benefit of an unsupported instruction to the contrary. Not only would such evidence effectively refute respondent's assertion that he should be granted mitigation of his sentence because of his alleged lack of criminal history, it would strengthen the jury's original determination that respondent be given a sentence of death.

In any event, in the instant case the absence of prior criminal convictions does not mean that the prisoner was free from a "significant history of prior criminal activity." The distinction between juvenile adjudications and criminal convictions relates to the legal consequences of an act, not to the essence of the act. The rule of Missouri law forbidding the use of juvenile adjudications as evidence in Missouri trial courts does not make the activity a person was found to have committed any less odious. That rule of law stems from a policy to promote rehabilitation of the offender at the cost of denying triers of fact relevant evidence in later cases. In the instant case, it would have been contrary to fact for the trial judge to have instructed the jury that the prisoner had "no significant history of prior criminal activity." Respondent Lashley may have had the right to have the juvenile adjudications excluded from the evidence in aggravation, but he did not have the right to a windfall instruction which was disaffirmed by his behavior. Far from having created unfair prejudice for the prisoner, the trial judge's refusal of a specific, contrary-to-fact instruction -- coupled with the less specific mitigation instructions and the silent record -- was probably the most equitable disposition of

this matter.

As this Court has repeatedly recognized, in reviewing jury instructions, a single incident may not be revived in artificial isolation, but must be viewed in the context of the overall charge. ***Cupp v. Naughten***, 414 U.S. 141, 146-147 (1973); ***Estelle v. McGuire***, 112 S.Ct. at 482.

Taken as a whole, it cannot be said that there is "a reasonable likelihood" that the jury has been deprived of consideration of any mitigating factor. In fact, in addition to specifically being instructed that they could consider the age of the defendant at the time of the offense as a mitigating circumstance, the jury was also instructed that they could consider "any circumstances" which were found from the evidence "in extenuation or mitigation of punishment." MAI-CR 2d 15.44 (App. A-102 - A-105). The jury was also provided with a specific "life-option" instruction in this case which read:

> Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

MAI-CR 2d 15.46 (App. A-106).

Even in the absence of a specific listing of the mitigating circumstance in question (lack of significant history of prior criminal activity), the full charge submitted to the jury by the circuit court comports with constitutional requirements. *See* ***Blystone v. Pennsylvania***, 110 S.Ct. 1078, 1084 (1990); ***Jones v. Murray***, 947 F.2d 1106, 1119-1120 (9th Cir. 1991) *cert. denied*, 112 S.Ct. 1591 (1992); *cf.* ***Peek v. Kemp***, 784 F.2d 1479, 1491-1493 (11th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 939 (1986). The jury in this case was given the opportunity to consider and give effect to any factor they felt would have mitigated punishment in this case.

If this evidentiary "blank slate" -- as the court of appeals terms it -- is so significant that it is evidence for the purpose of satisfying the majority's ***Lockett*** analysis, then it cannot have been lost on the jury. The trial judge instructed the jury that it could consider in mitigation "any circumstances" found from the evidence. For the very reason the court of appeals relies on in striking down the judgments of the jury, the trial judge, the Missouri Supreme Court on direct appeal and the federal district court--*i.e.*, the substantive salience of the absence of serious prior criminal activity--the jury may not blithely be presumed to have ignored it. Yet, that is the effect of the federal appellate court's holding on this issue: from the fact that no evidence of serious prior criminal activity was presented to the jury, and the law (undisputed by any participant in these proceedings) that the jury could consider this circumstance, the Eighth Circuit has leaped to the result that the trial court had to instruct on this specific mitigating circumstance -- in addition to giving the more inclusive mitigating-circumstance instruction and the life-option instruction. What the present case establishes as the law is not that the jury may consider the absence of serious prior criminal activity, but that it must be specially instructed to do so--even when defense counsel does not proffer, through reasonable trial strategy, such evidence to the jury.

The sentence given to respondent by the St. Louis City jury in 1982 would not have been different even if the jury had been given one additional mitigating circumstance which was unsupported by any evidence respondent presented during the guilt or punishment phases of the criminal trial.

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

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92-409 (2)

No._____

In The
Supreme Court of the United States
October Term, 1992

PAUL DELO, SUPERINTENDENT
Potosi Correctional Center,
Petitioner,

v.

FREDERICK LASHLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1036EM

Frederick Lashley, Appellant, v. William Armontrout, Warden, Missouri Department of Corrections, Appellee.	•	On Appeal from the United States District Court for the Eastern District of Missouri

Submitted: October 8, 1990
Filed: March 4, 1992

Before ARNOLD* and FAGG, Circuit Judges, and WATERS,** District Judge.

* The Hon. Richard S. Arnold became Chief Jude of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

** The Hon. H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas, sitting by designation.

ARNOLD, Circuit Judge.***

Frederick Lashley, a Missouri prisoner convicted of capital murder, appeals the District Court's denial of his 28 U.S.C. § 2254 application for a writ of habeas corpus. We affirm the conviction, but reverse and remand for resentencing.

I.

Lashley "brutally took the life of [a] physically infirm woman, who for many years had cared for and reared him, in order to rob her." *State v. Lashley*, 667 S.W.2d 712, 716 (Mo.), *cert. denied*, 469 U.S. 873 (1984). Lashley broke into his foster mother's home while she was away, darkened the front room, and lay in wait. When his foster mother returned, he struck her over the head with a cast-iron skillet, using enough force to break the skillet into two pieces. She fell to the floor, and a struggle ensued. Knowing his foster mother had a soft spot in her skull, Lashley ended the struggle by plunging a butcher knife into this vulnerable area. He then stole $15 from his foster mother's purse, took the keys to her car, and departed. Lashley's foster mother died two days later.

A state-court jury convicted Lashley of capital murder, and he was sentenced to death. The Missouri Supreme Court affirmed the conviction and death sentence. *Id.* Lashley unsuccessfully sought state postconviction relief before bringing this federal habeas action. See *Lashley v. State*, 721 S.W.2d 31 (Mo. App. 1986), *cert. denied*, 481 U.S. 1024 (1987). On appeal from the District Court's denial of habeas relief, he raises a number of issues, and we address them in turn.

*** The signer of this opinion wishes to express his thanks to Judge Fagg for significant contributions to its composition.

II.

A.

Lashley contends he received ineffective assistance of counsel because his trial attorney failed adequately to investigate and raise diminished capacity as a defense during the guilt phase of his trial and as a mitigating factor during the penalty phase. As a reviewing court we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To prevail on his ineffective-assistance-of-counsel claim, Lashley acknowledges that he must show his trial attorney's representation was deficient, and that the deficient performance prejudiced his defense. *Id.* at 687. In attempting to make this showing, Lashley does not challenge the findings made by the Missouri Court of Appeals, *Lashley v. State*, 721 S.W.2d at 32-34.

During the state postconviction hearing, Lashley's trial attorney testified that he considered presenting a theory of diminished capacity during the guilt and penalty phase of the trial based on Lashley's claim that he was high on drugs when he killed his foster mother. The attorney decided not to do so after he evaluated the evidence available to support the theory and discussed trial strategies with co-counsel, several other attorneys, and Lashley. *Id.* at 32-33.

Counsel investigated petitioner's claimed ingestion of drugs, but the results of this investigation did not substantiate Lashley's story. The psychiatrist who examined Lashley told the attorney there was no evidence Lashley was high on drugs the night of the murder. *Id.* at 33. Similarly, the two witnesses petitioner named to support his claim did not produce useful information. *Id.* One witness could not be located by the

attorney's investigator. The other could not pinpoint the date she had seen Lashley intoxicated. A third witness, present when the police arrested Lashley, testified at the postconviction hearing that Lashley did not appear high or act abnormal until after his arrest. *Id.* at 33-34. This left petitioner himself as the only witness who could testify that he was under the influence of drugs on the day of the murder. Lashley's attorney believed he would be a liability as a defense witness, and Lashley's psychiatrist was unwilling to put any stock in his uncorroborated story. *Id.* at 33.

A defense attorney is not ineffective for not presenting an implausible theory of defense or mitigation. "[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense . . ., counsel cannot create one and may deserve the interests of his clients by attempting a useless charade." *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984) (citation omitted); see also *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986) (citing *Cronic* and holding an attorney is not required to present a baseless intoxication defense); *cf. Thompson v. Jones*, 870 F.2d 432, 434-35 (8th Cir. 1988) (holding attorney not ineffective for failing to raise meritless issues on appeal).

In this case, Lashley's attorney thoroughly investigated the claim of diminished capacity. The attorney's investigation, however, turned up no support for Lashley's assertions. This left the attorney with nothing more than an unimpressive client, telling an improbable and uncorroborated story, which was effectively refuted by his own calculated behavior on the night of the murder. Lashley's attorney then made an informed, strategic decision against presenting evidence that his client was drug-impaired, and Lashley concurred with his attorney's decision. *Lashley v. State*, 721 S.W.2d at 33. Given these circumstances, the Missouri Court of Appeals held "there was

a reasonable basis for [the attorney's] trial strategy." *Id.* at 34. We agree and conclude that the attorney acted within the bounds of professionally competent assistance. *Strickland*, 466 U.S. at 688, 690-91.

B.

The relevant facts pertaining to this issue are stated in *State v. Lashley*, 667 S.W.2d at 714-15. In short, following the penalty phase of the trial, the jury returned an improperly worded verdict imposing the death penalty. Lashley's attorney agreed that the form of the verdict was improper. *Id.* at 715. Over the objections of the attorney, the trial court informed the jurors that their verdict was not in the proper form and told them to review the court's instructions. The court then excused the jury to deliberate further. After a short time, the jury returned a verdict in proper form, again imposing the death penalty. The trial court polled the jurors to ensure the verdict was unanimous.

Lashley contends that the trial court's refusal to accept the jury's initial verdict placed him in double jeopardy and interfered with his right to a jury trial. These claims are without merit. A trial court may ask a jury to correct its verdict without violating the Fifth and Sixth Amendment rights Lashley raises. See *United States v. Mears*, 614 F.2d 1175, 1179 (8th Cir.), *cert. denied*, 446 U.S. 945 (1980) (jury may correct verdict that is improper due to inadvertent error); *Brown v. Gunter*, 562 F.2d 122, 124-125 (1st Cir. 1977) (defendant's Fifth and Sixth Amendment rights not violated by state trial court's allowing jury to correct its verdict from not guilty to guilty). We agree with the Missouri Supreme Court that the trial court "could not have handled the situation in a more neutral manner." *State v. Lashley*, 667 S.W.2d at 715. Under Missouri law, a "jury's verdict is not binding until it is accepted by the court and the jury discharged." *Id.* The trial court simply complied with Mis-

souri law by requiring the jury to deliberate further and to return a verdict in proper form, *id.*, and Lashley's constitutional rights were not impaired.

C.

Lashley next contends the prosecution presented insufficient evidence of premeditation, deliberation, and intent to commit capital murder. The State responds that Lashley is procedurally barred from raising this claim because he failed to include the claim in his appeal to the Missouri Supreme Court. Although the State may be correct, we nonetheless choose to address the merits of Lashley's claim. See *Long v. Iowa*, 920 F.2d 4, 6 n.2 (8th Cir. 1990) (when claim lacks merit, court may bypass procedural bar and deny relief on the merits).

Lashley does not challenge the controlling principles of state law. In Missouri, premeditation and deliberation properly may be inferred from the circumstances of the crime. *Turner v. Armontrout*, 845 F.2d 165, 168 (8th Cir.), *cert. denied*, 488 U.S. 928 (1988). Additionally, premeditation and deliberation need not exist in the assailant's mind for any particular period of time. *State v. Roberts*, 709 S.W.2d 857, 863 (Mo.), *cert. denied*, 479 U.S. 946 (1986) (premeditation); *State v. McDonald*, 661 S.W.2d 497, 501 (Mo. 1983), *cert. denied*, 471 U.S. 1009 (1985) (deliberation).

Having reviewed the record in the light most favorable to the prosecution, we conclude that a "rational trier of fact could have found the essential elements of [capital murder] beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The record shows Lashley broke into his foster mother's home, waited in ambush for her to return, and deliberately plunged a knife through a known soft spot in her skull. In our view, a rational jury could infer that by lying in wait and inflicting a selective mortal wound, Lashley did

premeditate, deliberate, and intend to murder his foster mother.

D.

Lashley next contends he was denied his Sixth Amendment right to a fair and impartial jury because the trial court violated *Witherspoon v. Illinois*, 391 U.S. 510 (1968), when it excused for cause jurors who expressed an unwillingness to impose the death penalty. Lashley argues that five of the jurors did not demonstrate sufficient reluctance about the death penalty to sustain the prosecution's challenges for cause. We disagree. The record shows that each of these jurors unequivocally indicated an unwillingness or inability to consider the death sentence in the event of a capital murder conviction. The Supreme Court has made clear that jurors opposed to the death penalty may be excused for cause if their opposition would "'prevent or substantially impair the performance of [their] duties . . . in accordance with [the] instructions and [the] oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)) (footnote omitted). The trial court properly excused these jurors for cause.

E.

During the guilt phase of the trial, the prosecution introduced a number of items recovered from the murder scene, including a hammer found next to a piece of the broken skillet. According to Lashley, the hammer was inadmissible, and the prosecution introduced it to inflame the jury. The trial court ruled the hammer was admissible under state law, and the Missouri Supreme Court affirmed that decision. 667 S.W.2d at 714. Lashley contends that he was denied his due-process right to a fair trial by the erroneous admission of the hammer into evidence.

"The admissibility of evidence is a matter of state law,

and we review admissibility rulings in a federal habeas corpus action `only when the [claimed] error . . . is so prejudicial that it amounts to a denial of due process.''' *Kuntzelman v. Black*, 774 F.2d 291, 292 (8th Cir. 1985) (citation omitted). ''A denial of due process occurs when the error is `gross, conspicuously prejudicial or of such import that the trial was fatally infected.''' *Redding v. Minnesota*, 881 F.2d 575, 579 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 1158 (1990) (citation omitted). In this case, we agree with the district court that ''[w]hether [Lashley] struck his victim with a skillet . . . or struck her with a hammer . . . does not at all change the character and nature of his act.'' The hammer was introduced along with other items recovered from the murder scene, and ''[a] photograph showing the hammer and piece of skillet had already been received in evidence--without objection.'' *State v. Lashley*, 667 S.W.2d at 714. ''[T]he only mention of the hammer in closing arguments was made by defense counsel[, and] it is beyond dispute that the butcher knife wielded by [Lashley] was the death weapon.'' *Id.* With these circumstances in mind, we cannot conclude the admission of the hammer denied Lashley a fair trial.

F.

Lashley also contends the District Court erred in dismissing his application for a writ of habeas corpus without holding an evidentiary hearing. This argument has no merit. ''Dismissal without a hearing is . . . proper [when] the facts are not in dispute or [when] the dispute can be resolved on the basis of the record.'' *Lindner v. Wyrick*, 644 F.2d 724, 729 (8th Cir.), *cert. denied*, 454 U.S. 872 (1981). Lashley had a full evidentiary hearing during his state postconviction proceeding. On the basis of the trial record, the postconviction transcript, and the parties' briefs, the District Court denied habeas relief. Petitioner has failed either to show how the state-court record is

deficient, or to indicate what additional information could be produced at another evidentiary hearing that would alter the outcome of this habeas action. The District Court properly declined to hold an evidentiary hearing.

G.

Lashley contends he received ineffective assistance of counsel because his trial attorney failed to introduce evidence to support a mitigating-circumstance instruction as to no significant history of past criminal activities. This claim is procedurally barred because it was not included in the postconviction appeal to the Missouri Court of Appeals. Petitioner contends his postconviction counsel was ineffective in failing to preserve the point, and that this is cause for his procedural default. We disagree. The Supreme Court recently made clear that ineffective assistance of postconviction counsel is not cause to excuse procedural default. *Coleman v. Thompson*, 111 S.Ct. 2546, 2567-68 (1991). ''As [Lashley] does not argue in this [c]ourt that federal review of his claim[] is necessary to prevent a fundamental miscarriage of justice, he is barred from bringing [this] claim in federal habeas.'' *Id.* at 2568.[1]

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[1] The writer of this opinion (speaking for himself alone on this point) would take a different approach to the question of trial counsel's failure to introduce affirmative evidence to show that petitioner had no significant criminal history. In my view, trial counsel made a reasonable effort to introduce this evidence but was prevented from doing so by an incorrect ruling of the state trial court. The court told counsel that if she insisted on offering evidence that Lashley had no criminal record, it would permit the state to counter this evidence by showing that petitioner had committed juvenile offenses. This ruling was flatly contrary to state law, which provides:

(Footnote continued)

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H.

Although we find no merit in any of Lashley's other claims, we agree with him that the Missouri trial court violated the Eighth Amendment by refusing to give the mitigating-circumstance instruction Lashley requested -- i.e., "The defendant has no significant history of prior criminal activity." Mo. Rev. Stat. § 565.012.3(1) (Supp. 1982) (current version at Mo. Rev. Stat. § 565.032.3(1) (Supp. 1990)).

During a conference preceding the penalty phase, the defense attorney made a motion in limine to prevent the State from introducing any evidence of Lashley's juvenile record. Missouri Revised Statutes § 211.271 (1978) prohibits the introduction of a defendant's juvenile record for *any* purpose. The statute also says that a juvenile adjudication is not a criminal act. This Court assumes, although Lashley's attorney did not say so, that her basis for this motion was that statute. In any event, the trial judge never ruled on Lashley's motion, but

(Footnote continued)

1. No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.

• • •

3. After a child is taken into custody as provided in Section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this

(footnote continue

appeared to agree with the State that if the defense opened the door with evidence of Lashley's "criminal history" (or lack thereof), the prosecutor could walk right through it with evidence of Lashley's juvenile record. Consequently, the defense did not introduce any evidence of Lashley's lack of criminal history. The prosecution, however, also failed to introduce any evidence of adult criminal activity by Lashley, and because of his age at the time of the offense -- 17 years and 30 days, an adult for purposes of criminal prosecution a mere 30 days -- it is

(footnote continued)

chapter, as well as all reports and records of the juvenile court *are not lawful or proper evidence* against the child and *shall not be used for any purpose whatsoever in any proceedings, civil or criminal,* other than proceedings under this chapter.

Mo. Rev. Stat. § 211.271 (1978) (emphasis mine). I believe that this ruling, in and of itself, is a separate and distinct violation of the principle of *Lockett v. Ohio*, 438 U.S. 586 (1978), discussed below in part H. of this opinion.

The other two members of this Court do not agree with this view. They believe -- and this is therefore the holding of this Court on the point -- that the trial court was not called upon to rule in respect to the admissibility of defendant's juvenile record. Thus, the majority does not agree that the record reflects that the trial court prevented defendant's counsel from attempting to prove that defendant had no significant criminal history by ruling or advising her that the state would be permitted to cross examine in respect to defendant's juvenile record if she attempted to offer evidence in respect to his lack of criminal history. Therefore, this Court does not reach the merits of the contention that the trial judge's ruling, contrary to Missouri law, amounted to a distinct *Lockett* violation.

unlikely that the prosecution could have supported a finding of a "*significant* history of prior criminal activity." (Emphasis ours.) At any rate, it did not do so, as no evidence whatever was introduced by either side as to the defendant's prior criminal record. Despite the blank record on Lashley's prior criminal history, the trial judge refused the defense attorney's request for the mitigating-circumstance instruction.

The Eighth Amendment requires a trial court to allow the jury to consider, as a mitigating factor, "*any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Court's language strongly suggests, if it does not dictate, a liberal allowance of mitigating-circumstance evidence and instructions by trial courts. What's more, although not necessary to our decision, the mitigating circumstance involved in this case was expressly mentioned by a Missouri statute. *Lockett* obligated the Missouri trial court to give the requested instruction, if it was warranted by the evidence. We believe that it was.

Lockett makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it. The evidence before the jury in this case presented a blank slate. As far as the jury was concerned, Lashley had no significant history of prior criminal activity, and, therefore, he was entitled to have the jury consider that fact as a mitigating circumstance. The trial judge's failure to give the requested instruction under these circumstances violated the defendant's Eighth Amendment rights as expressed in *Lockett*.

Accordingly, the Missouri trial court must promptly commence proceedings to resentence the petitioner, unless the

State wishes to reduce his sentence to life imprisonment. *Lockett* requires the State -- which is in a peculiarly advantageous position to show a significant prior criminal history, if indeed Lashley has such a history -- to come forward with evidence, or else the court must tell the jury it may consider the requested mitigating circumstance. If the point is raised by the defendant, the state trial judge should determine at the time of resentencing if introduction of such evidence is barred by the Double Jeopardy Clause. See *Bullington v. Missouri*, 451 U.S. 430 (1981). We express no view on the merits of this issue. We simply hold that the lack of any evidence whatever of Lashley's prior criminal activity entitled the defendant to the requested instruction, and the Missouri trial court's failure to give that instruction violated the Eighth Amendment as explained in *Lockett*.

III.

Insofar as the conviction itself is concerned, we agree with the District Court that it is not invalid under the federal Constitution. With respect to the sentence, however, we reverse, and remand the matter to the District Court with instructions to grant the writ unless the State commences proceedings to resentence the petitioner consistently with this opinion, within such reasonable time as the District Court may fix.

It is so ordered.

FAGG, Circuit Judge, dissenting and concurring.

I dissent from the court's holding in part H, which overturns Lashley's death sentence. I join in parts A-F and concur in part G of the court's opinion. I would thus affirm both Lashley's capital murder conviction and death sentence.

Dissent from Part H

In part H, the court reverses a brutal killer's death sentence because the state trial judge refused to give a mitigating circumstance instruction on a barren record. *Ante* at 10-12. Although the court concedes Lashley failed to offer any evidence showing he had no significant history of criminal activity to support his requested instruction, the court concludes Lashley was entitled to the instruction once he asked for it. In my view, the court's position is contrary to controlling Supreme Court precedent. I thus dissent.

My disagreement with the court is simple: In concluding Lashley was entitled to a mitigating circumstance instruction despite "the lack of any evidence whatever of Lashley's prior criminal activity," *ante* at 12, the court misapplies *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality). *Lockett* holds the sentencer in a capital case must be permitted to consider mitigating evidence offered by the defendant. *Id.* at 604; *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). When the record contains evidence of a particular mitigating circumstance, the defendant is entitled to have the jury instructed on that circumstance. *Penry v. Lynaugh*, 492 U.S. 302, 319-28 (1989). *Lockett* and *Penry*, however, do not stand for the proposition that state trial courts must instruct juries on mitigating circumstances when supporting evidence has not been presented. Due process requires that state trial courts give mitigating circumstance instructions only when the evidence warrants those instructions. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982). Indeed, injecting mitigating circumstance instructions into capital cases without supporting evidence would "invite[] the jurors to disregard their oaths," and would invariably lead to conjectural and capricious sentencing decisions--the very thing *Lockett* seeks to avoid. *Id.*

I believe the court has made three mistakes in holding "the Missouri trial [judge]'s failure to give [Lashley's requested] instruction violated the Eighth Amendment as explained in *Lockett*." *Ante* at 12. First, the court is mistaken when it states "*Lockett* makes it clear that [Lashley] is not required to meet any particular burden of proving a mitigating factor . . . before the [jury] is permitted to consider [the factor]." *Ante* at 11. Contrary to the court's reading of *Lockett*, the Supreme Court expressly left this question open, stating, "[W]e need not address [the] contention . . . that it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases." *Lockett*, 438 U.S. at 609 n.16. Since *Lockett*, the Supreme Court has held the Constitution is not violated when a state requires capital defendants to bear this risk. *Walton v. Arizona*, 110 S.Ct. 3047, 3055 (1990) (plurality); *see also id.* at 3066-68 (Scalia, J., concurring) (rejecting *Lockett* as unsound and without constitutional foundation). Based on the holding in *Walton*, I believe it is clear the state trial judge did not violate *Lockett* by refusing to give Lashley's requested mitigating circumstance instruction on an empty record.

Second, the court mistakenly holds "*Lockett* requires the state . . . to come forward with evidence [showing Lashley's criminal history], or else the [trial] court must tell the jury it may consider the requested mitigating circumstance." *Ante* at 12. The Supreme Court rejected this position in *Walton*, holding there is no "constitutional imperative . . . that would require the [sentencer] to consider the mitigating circumstances claimed by a defendant unless the State negate[s] them." 110 S.Ct. at 3055. In Lashley's case, the State had neither a burden nor a reason to introduce evidence refuting a mitigating circum-

stance about which the record was otherwise silent.

Finally, the court mistakenly concludes *Lockett* obligated the state trial judge to give Lashley's requested mitigating circumstance instruction even though the record did not contain a shred of evidence to support it. Essentially, the court holds that a lack of evidence is itself evidence. *Ante* at 11. I say this based on the court's reasoning that although "[t]he evidence before the jury . . . *presented a blank slate*[, a]s far as the jury was concerned, Lashley had no significant history of prior criminal activity and, therefore, he was entitled to have the jury consider that *fact* as a mitigating circumstance." *Id.* (emphasis mine). Simply stated, the court's position is at odds with *Lockett*, *Eddings*, *Penry*, and *Walton*. These cases make clear that before a capital defendant is entitled to have the jury consider a mitigating circumstance, the defendant must first present evidence supporting that circumstance. Indeed *Walton* leaves no doubt the constitution permits states to insist capital defendants establish "by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." 110 S.Ct. at 3055.

Unlike the defendant in *Walton*, however, Lashley did not have to prove his mitigating circumstances by a preponderance of the evidence. Under Missouri law, Lashley was merely required to introduce some evidence in support of the mitigating circumstance instruction he requested. *See State v. Lashley*, 667 S.W.2d 712, 715-16 (Mo.), *cert. denied*, 469 U.S. 873 (1984). The Missouri Supreme Court expressly held Lashley was not entitled to his requested instruction because he chose to leave the record completely silent on the issue of his past criminal activity. *Id.* Thus, the state trial judge properly denied Lashley's requested instruction, and this did not impinge on Lashley's constitutional rights. Although *Lockett* and *Penry* guarantee capital defendants the right to offer mitigating evi-

dence and the right to submit jury instructions giving effect to that evidence, *Lockett* does not require a state to abandon its rules of evidence. *See Walton*, 110 S.Ct. at 3055. Thus, given these circumstances Lashley cannot complain about the trial judge's refusal to give an instruction that had no foundation whatsoever in the record.

In my view, the court unnecessarily reverses Lashley's death sentence based on the state trial judge's proper refusal to give a requested jury instruction that has no support in the record. To do so, the court misreads *Lockett*, fails to follow *Walton*, overlooks *Penry* and *Hopper*, and rejects Missouri state law. Because the court ignores this controlling authority, I dissent.

Concurrence in Part G

In part G and footnote one, the court's opinion combines two distinct contentions Lashley raises on appeal about his attorney's failure to introduce evidence in support of his requested mitigating circumstance instruction. First, Lashley contends he received ineffective assistance of counsel because his trial attorney failed to introduce mitigating evidence in support of his requested instruction. Judge Arnold, Judge Waters, and I agree the district court properly rejected this contention, and further explanation of the court's position is unnecessary. *Ante* at 8-9 (main text of part G). In his second contention, Lashley claims the state trial court, in violation of *Lockett*, precluded his attorney from introducing supporting mitigating evidence. Judge Arnold agrees with Lashley and would reverse based on *Lockett*. *See ante* at 9 n.1. Judge Waters and I, however, disagree with Lashley's contention. *Id.* Because footnote one of the court's opinion only briefly states our position, I write separately to explain our holding.

In his *Lockett* contention, Lashley claims he was denied due process because the state trial judge prevented his attorney from introducing evidence to support his request for the mitigating circumstance instruction. According to Lashley, the trial judge erroneously ruled the State could use evidence of his juvenile record to rebut his criminal-history witnesses. *See* Mo.Rev.Stat. § 211.271 (1978) (statute governing use of juvenile records). A careful review of the record reveals Lashley's claim is unfounded.

During a pretrial conference preceding the penalty phase of Lashley's trial, the State broached the subject of Lashley's juvenile record and its admissibility under state law. (T. 709). Lashley's attorney made her trail strategy clear to the trial judge and the prosecutor when she responded, "I am not going to ask [Lashley's witnesses] about [Lashley's] juvenile record and I am . . . making a motion in limine that the State be prohibited from introducing . . . or eliciting evidence of . . . Lashley's juvenile record." (T. 711). The prosecutor replied he did not intend to introduce evidence of Lashley's past criminal activities unless defense witnesses testified Lashley had no criminal history. (T. 711-12).

In presenting her motion and during the ensuing dialogue with the prosecutor and the trial judge, Lashley's attorney repeatedly emphasized she was not going to ask her witnesses any questions about Lashley's juvenile record or his criminal activity. (T. 712). Indeed, with prepared questions in hand, Lashley's attorney told the trial court she would ask two defense witnesses how they knew Lashley, how Lashley acted around them, whether they loved Lashley, and whether they wanted the jury to spare Lashley's life. (T. 712, 714-15). The trial judge asked Lashley's attorney whether she intended to ask these witnesses about Lashley's behavior, and the attorney responded, "I didn't plan to ask that question." (T. 713-14). The

prosecutor had no quarrel with the proposed questions, and he assured the judge and Lashley's attorney the State would not delve into Lashley's past criminal activities. With this understanding between counsel, the trial judge never ruled on Lashley's motion in limine.

It seems to me Judge Arnold runs against the grain of the record when he states the trial judge "told counsel that if she insisted on offering evidence that Lashley had no criminal record, [the judge] would permit the state to counter this evidence by showing that [Lashley] had committed juvenile offenses." *Ante* at 9 n. 1. Lashley's attorney stated no less than three times on the record that she was not going to ask her witnesses about Lashley's past criminal behavior. (T. 711-12). In response, the trial judge gently urged Lashley's attorney to present mitigating evidence by telling her the state had a reasonable position that Lashley was not entitled to a mitigating circumstance instruction without first presenting supporting evidence (T. 712). Then, in the midst of Lashley's attorney's fourth declaration that she was not going to present any evidence of Lashley's past criminal history, the trial judge observed, "If you are going to try to prove by these witnesses that this is [Lashley's] first problem with the law, when in fact it is not, I have . . . problems with your proposition [that the state could not rebut this evidence]." (T. 714). In response, Lashley's attorney reiterated the prepared questions she intended to ask her witnesses--all of which were unrelated to Lashley's criminal history--and the trial judge told her "no problem." (T. 715). In sum, the dialogue between counsel and the trial judge lends no support to Judge Arnold's conclusion that Lashley's attorney "made a reasonable effort to introduce [mitigating] evidence but was prevented from doing so by an incorrect ruling of the state trial [judge]." *Ante* at 9 n.1.

Contrary to Lashley's argument that the trial judge

interfered with his presentation of criminal history evidence, the Missouri Supreme Court found "it was defense counsel's position that the absence of any criminal history being adduced warranted the [mitigating circumstance] instruction." *State v. Lashley*, 667 S.W.2d at 715; (T. 725). Indeed, Lashley's attorney repeatedly explained to the trial judge she was "not going to ask [her witnesses] whether or not [Lashley] ha[s] a record." (T. 725). Although the trial judge believed Lashley's attorney should present mitigating evidence based on Lashley's past criminal history, it was the attorney's strategy to forgo the introduction of any supporting evidence because she believed Lashley was entitled to the requested instruction regardless whether she presented supporting evidence. *State v. Lashley*, 667 S.W.2d at 715.

Thus, the trial judge in no way precluded Lashley's attorney from introducing mitigating circumstance evidence shedding light on the extent of Lashley's criminal history. In any event, the cause for the attorney's concern--the State's introduction of Lashley's criminal record as a juvenile--never materialized at trial. Lashley's attorney asked each and every question she anticipated asking; the State never broached the subject of Lashley's past criminal activities; and the trial judge did not interfere with the attorney's trial strategy. (T. 746-55).

Lashley's attorney may have feared that if she offered evidence Lashley had no significant history of criminal activity, the State might be permitted to respond with unfavorable evidence of Lashley's criminal behavior as a juvenile--evidence she deemed inadmissable under state law. Nevertheless, this did not relieve her burden to present Lashley's mitigating evidence in the first place. Simply put, Lashley's attorney should have offered testimony about Lashley's behavioral history and then objected to the State's cross-examination of her witnesses if it exceeded its permissible scope under Missouri

law. *Byrd v. Armontrout*, 880 F.2d 1, 11 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 1326 (1990). Had Lashley and his attorney followed this course, the record presumably would have supported Lashley's requested instruction, and if the State had offered evidence of Lashley's juvenile record or his underlying criminal behavior in a manner that violated state law, that error would have been preserved for review. Lashley and his attorney, however, decided against introducing any evidence showing Lashley did not have a significant criminal history. Thus, Judge Waters and I agree Lashley's claim that the trial judge prevented his attorney from establishing a mitigating circumstance in violation of *Lockett* must be rejected.

Conclusion

Although I agree this court must reject Lashley's contentions attacking his capital murder conviction, I disagree with the court's decision to overturn Lashley's death sentence. I would thus affirm the district court's denial of Lashley's application for a writ of habeas corpus.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1036EMSL

Frederick Lashley,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
	*	Rehearing and Suggestion
v.	*	for Rehearing En Banc
	*	
William Armontrout,	*	
Warden	*	
Missouri Department	*	
of Corrections,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

July 1, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FREDERICK LASHLEY,	)	
Petitioner,	)	
	)	
v.	)	No. 87-897 C (2)
	)	
WILLIAM	)	
ARMONTROUT,	)	
Respondent.	)	

JUDGMENT

In accordance with the mandate of the United States Court of Appeals for the Eighth Circuit filed July 9, 1992, and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the petition of Frederick Lashley for habeas corpus relief, only on petitioner's claim that the Missouri trial court violated the Eighth Amendment by refusing to give a mitigating-circumstance instruction on the absence of a significant history of criminal activity during the penalty phase of petitioner's trial, is conditionally **GRANTED**; said writ to issue unless the State of Missouri begins proceedings to resentence petitioner for the crime charged, or determines that petitioner's sentence should be reduced to life imprisonment, within ninety days of the date of this order. In all other respects, the writ is **DENIED**.

Dated this 20th day of July, 1992.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FREDERICK LASHLEY, Petitioner,	)	No. 87-897 C (2)
v.	)	
BILL ARMONTROUT, Respondent.	)	

ORDER

In accordance with the memorandum filed this date and incorporated herein,

IT IS HEREBY ORDERED that petitioner's habeas corpus grounds 1 and 10 are DENIED and therefore DISMISSED with prejudice.

IT IS FURTHER ORDERED that the stay of execution shall remain in effect through January 12, 1990 to give petitioner time to proceed with an appeal and seek a further stay from the United States Court of Appeals for the Eighth Circuit. After January 12, 1990, the stay of execution now in effect shall be vacated.

Dated this 13th day of December, 1989.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FREDERICK LASHLEY, Petitioner,	)	No. 87-897 C (2)
v.	)	
BILL ARMONTROUT, Respondent.	)	

MEMORANDUM

This matter is before the Court on the petition of Frederick Lashley for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to United States Magistrate David D. Noce who filed his Report and Recommendation. Magistrate Noce recommended that as to two of the grounds in petitioner's petition, 1 and 10, the petition be stayed pending the Supreme Court's disposition of similar issues in cases pending before it. The Court adopted this recommendation and stayed the petition as to these two issues. They are now ripe for review.

Petitioner is under sentence of death for the offense of capital murder. In his first ground for relief he argues that the death penalty represents cruel and unusual punishment because he was seventeen years old when he committed the crime. This ground for relief must now be denied. The Supreme Court has held that the imposition of the death penalty on a seventeen year old "does not offend the Eighth Amendment's prohibitions against cruel and unusual punishment." ***Stanford v. Kentucky***, ___ U.S. ___, 109 S.Ct. 2969, 2980 (1989).

The Court also stayed petitioner's petition as to his tenth ground in which he alleged he was denied his right to a fair and impartial jury because the state was allowed to introduce

inflammatory evidence not relevant to the victim's injury. The stay was based on the Court's belief that the Supreme Court might rule on this issue in ***Thompson v. Oklahoma***, ___ U.S. ___, 108 S.Ct. 2687 (1988). The Supreme Court, however, did not need to decide the issue in that case.

Petitioner's confession, introduced at his trial, was that he struck his victim on the head with an iron skillet causing it to break into two pieces. He then stabbed her in the head with a butcher knife. *See*, ***State v. Lashley***, 667 S.W.2d 712, 714 (Mo. banc 1984). Half the skillet was found laying near the victim. The other half of the skillet was laying near a small hammer. The skillet pieces and the hammer were introduced into evidence. There was no evidence the hammer was used in the commission of the crime. Thus, petitioner asserts its introduction into evidence inflamed the jury.

Assuming, without so deciding, that it was error to allow the prosecutor to introduce the hammer into evidence there is no remedy under 28 U.S.C. § 2254 unless there was a violation of petitioner's due process rights. To show a due process violation petitioner must show the introduction of the hammer was so egregious as to render fundamentally unfair the entire trial. In other words, petitioner must show that but for the introduction of the hammer the outcome of the trial would have been different. ***Hamilton v. Nix***, 809 F.2d 463, 470 (8th Cir. 1987).

Whether before he stuck a butcher knife into her head petitioner struck his victim with a skillet, as he confessed he did, or struck her with a hammer, as might be inferred from the presence of the hammer, does not at all change the character and nature of his act. The petitioner has failed to show that the jury would have found differently if it had not been presented with the possibility that the victim was struck by a hammer instead of the skillet. The Court agrees with the panel of the Missouri Supreme Court when it held petitioner "does not demonstrate how or in what manner he was prejudiced by the hammer being

received in evidence." ***Lashley***, *supra*, 667 S.W.2d at 714. The Court is not persuaded that the outcome would have been different had the hammer not been introduced into evidence. Thus, petitioner's tenth ground for relief will be denied.

This memorandum and the accompanying order dispose of grounds 1 and 10 of petitioner's petition for a writ of habeas corpus. Grounds 2 to 9 and 11 to 13 of said petition were disposed of in the Court's orders of June 9, 1988 and January 3, 1989. Thus, all grounds of the petition have now been disposed of by the Court and the Court's rulings are final orders.

Petitioner is under a sentence of death. The Court stayed his execution so that he could pursue his petition for a writ of habeas corpus. (Memorandum and Order of May 15, 1987.) That stay will be continued for thirty days to enable petitioner to pursue an appeal if he deems it appropriate.

An appropriate order will accompany this memorandum.

Dated this 13th day of December, 1989.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FREDERICK LASHLEY, Petitioner,	)	No. 87-897 C (2)
v.	)	
BILL ARMONTROUT, Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on respondent's motions to reconsider. Petitioner has not responded thereto.

Respondent moves the Court to reconsider its orders of June 9, 1988 and October 13, 1988. In its order of June 9, 1988, the Court dismissed petitioner's federal habeas corpus grounds 4, 6 and 9 without prejudice for failure to exhaust state remedies. Respondent argues that these grounds should have been dismissed with prejudice. Petitioner failed to advance these grounds at the appropriate stage of his state court appeal. Reconsideration is thus procedurally barred. Further, petitioner has failed to meet the cause and actual prejudice standard as required under these circumstances to entitle a petition to federal habeas corpus review. *See* ***Wainwright v. Sykes***, 433 U.S. 72 (1977). Respondent's argument is well taken; and, after careful reconsideration of the matter, the Court will therefore order that grounds four, six and nine of the petition for habeas corpus be dismissed with prejudice.

In its order of October 13, 1988, the Court extended the stay on grounds 1 and 10 of the petition pending the disposition of ***High v. Zant***, Cause No. 87-5666, and ***Wilkins v. Missouri***, Cause No. 87-6026, which were set for argument before the United States Supreme Court during the current term. Respon-

dent objects to the extension of the stay, arguing that the resulting delay in the litigation is unwarranted.

As was noted in respondent's memorandum, evidence was revealed in ***High*** indicating that the defendant may have lied to authorities about his age at the time his crime was allegedly committed. The United States Supreme Court thereafter granted certiorari in another death sentence case involving a seventeen-year-old defendant. ***Stanford v. Kentucky***, No. 87-5765. ***Wilkins*** and ***Stanford*** are set for oral argument during the current term, and it continues to appear likely that the issue set out in ground 1 of petitioner's petition for writ of habeas corpus will be resolved by the Supreme Court's decisions in these cases. Further, the Clerk of the United States Supreme Court has recently indicated to this Court that it is highly likely that these cases will indeed by considered by the Supreme Court during the current term. The Court will therefore extend the stay pending resolution of ***Wilkins*** and ***Stanford*** by the Supreme Court. The Court will reconsider the stay should it come ot the attention of the Court that these Supreme Court cases are not resolved as anticipated hereinabove.

Accordingly,

IT IS HEREBY ORDERED that respondent's motion to reconsider the Court's order of June 9, 1988 is GRANTED and grounds 4, 6 and 9 of Frederick Lashley's petition for writ of habeas corpus are DISMISSED with prejudice.

IT IS FURTHER ORDERED that respondent's motion to reconsider the Court's order of October 13, 1988 is DENIED.

Dated this 3rd day of January, 1989.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FREDERICK LASHLEY, Petitioner,	)	
	)	No. 87-897 C (2)
v.	)	
BILL ARMONTROUT, Warden, Missouri State Penitentiary, Respondent.	)	

ORDER

This matter is before the Court on the petition of Frederick Lashley for a writ of habeas corpus. The matter was referred to United States Magistrate David D. Noce, who has filed his Report and Recommendation. 28 U.S.C. §636(b). Respondent has objected thereto.

After careful consideration of this matter,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that petitioner's federal habeas grounds 4, 6, and 9 are DISMISSED without prejudice for failure to exhaust state remedies.

IT IS FURTHER ORDERED that petitioner's grounds 5 and 11 are DISMISSED with prejudice for failure to raise a

constitutional claim.

IT IS FURTHER ORDERED that petitioner's grounds 2, 3, 7, 8, 12 and 13 are DENIED and therefore DISMISSED with prejudice.

IT IS FURTHER ORDERED that petitioner's petition as to grounds 1 and 10 is STAYED pending the Supreme Court's disposition of the issues in ***Thompson v. Oklahoma***, ___U.S. ___, 107 S.Ct. 1284 (1987) (cert. granted). The parties shall advise the Court within three days of notice of disposition.

Dated this 9th day of June, 1988.

/s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FREDERICK LASHLEY,	)	
	)	
Petitioner,	)	No. 87-897 C (2)
	)	
v.	)	
	)	
BILL ARMONTROUT,[1]	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This cause is before the Court upon the petition of Frederick Lashley for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

Petitioner Lashley was convicted of capital murder in the Circuit Court of the City of St. Louis in April of 1982. He was sentenced to death. The conviction was affirmed on appeal by the Missouri Supreme Court. ***State of Missouri v. Lashley***, 667 S.W.2d 712 (Mo. en banc), *cert. denied*, 469 U.S. 873 (1984). Petitioner thereafter moved to vacate the judgment under Missouri Supreme Court Rule 27.26. The Circuit Court held an evidentiary hearing and denied relief. The Missouri Court of Appeals affirmed. ***Lashley v. State of Missouri***, 721 S.W.2d 31 (Mo.App. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1912 (1987).

[1] The Court has been advised by respondent Armontrout that his first name is Bill, not William.

On May 14, 1987, petitioner filed the instant petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254. Petitioner asserts 13 grounds for relief: (1) he was subjected to cruel and unusual punishment by the imposition of the death penalty when he had not reached the age of majority at the time of the offense; (2) he was denied effective assistance of counsel because his attorneys failed to investigate or present the defense of diminished capacity; (3) he was denied effective assistance of counsel because his attorneys failed to present statutory mitigating evidence of diminished capacity during the penalty phase of the trial; (4) he was denied effective assistance of counsel because his attorneys failed to present evidence to support the statutory mitigating circumstance that petitioner had no significant history of prior criminal activity; (5) he was denied effective assistance of counsel, due process and equal protection, because the 27.26 trial court failed to permit his attorney to withdraw when a conflict of interest was present; (6) he was denied effective assistance of counsel because his attorneys failed to introduce evidence that the felony was committed under the influence of extreme mental or emotional disturbance, a statutory mitigating circumstance; (7) he was denied due process and equal protection when the trial court refused to submit to the jury the statutory mitigating circumstance that the petitioner had no significant history of prior criminal activity; (8) he was denied due process, equal protection, right to trial by jury and right against double jeopardy when the trial court denied his motion for a judgment of acquittal on the death penalty or for a mistrial on the issue of punishment; (9) he was denied due process, equal protection, and the right to confront witnesses when the Missouri Supreme Court used his juvenile record to affirm the death penalty; (10) he was denied his right to a fair and impartial jury when the state was allowed to introduce inflammatory evidence that was not relevant to the injury to the victim; (11) he was denied due process and equal protection when the death penalty imposed

was disproportionate to other cases in which that sentence was not imposed; (12) he was denied due process and equal protection because the jury which convicted him was "death-qualified."

* * *

II. **Discussion of the merits.**

Of petitioner's eleven cognizable federal habeas claims, eight have been exhausted in the state courts. Six of these claims (grounds 2, 3, 7, 8, 12, and 13) will be addressed herein on the merits. As noted above, it is recommended that grounds one and ten be stayed pending the Supreme Court's ruling in ***Thompson v. Oklahoma***, *supra*, 107 S.Ct. 1284.

* * *

Petitioner next argues in federal ground seven that the trial court denied him due process and equal protection when it refused to submit to the jury a profferred instruction on a statutory mitigating circumstance, §565.012.3(1), R.S.Mo. (1982), *i.e.*, that he had no significant history of prior criminal activity. Petitioner contends that he was entitled to consideration of any relevant mitigating factors that he might have proferred to the trier of punishment. ***Eddings v. Oklahoma***, *supra*, 455 U.S. *at* 110; ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978).

The Missouri Supreme Court addressed this claim on its direct review of petitioner's conviction:

> Defendant contends the court committed reversible error in refusing to give his tendered instruction on mitigating circumstances which included the mitigating circumstance of defendant having no significant history of prior criminal activities.
>
> At the instruction conference[,] defense counsel and the prosecutor discussed the admissibility of defendant's juvenile record. As a result of defendant's counsel stating she was not going to delve into her client's juvenile record and the prosecutor's stating he did not intend to do so unless defense witnesses stated defendant had no prior criminal history, it was defense counsel's position that the absence of any criminal history being adduced warranted the instruction. Defendant's position is refuted by the italicized language contained in MAI-CR2d 15.44 which specifically states statutory mitigating circumstances are to be supported by the evidence. We so held in ***State v. Battle***, 661 S.W.2d 487, 492 (Mo. banc 1983). There being no evidence to support the statutory mitigating circumstance, the trial court correctly refused defendant's proferred instruction.

State of Missouri v. Lashley, *supra*, 667 S.W.2d *at* 715-716; Tr. 709-715, 725-726.

Federal courts in a habeas corpus proceeding are bound by the interpretation of state law as enunciated by the highest court of a state. *See*, ***Harkins v. Wyrick***, 589 F.2d 387, 391 (8th Cir. 1979). Missouri law requires that jury instructions be supported by the evidence presented at trial. ***State of Missouri v. Battle***, *supra*, 661 S.W.2d *at* 492; ***State of Missouri v. Lashley***, *supra*, 667 S.W.2d *at* 715-716; ***State of Missouri v. Williams***, 652 S.W.2d 102, 114 (Mo. banc 1983).

Petitioner was not denied the opportunity to present mitigating evidence to support the profferred instruction. (Tr. 710-15, 725-26.) Had the state trial court refused admission of

evidence of any mitigating factors, it would have violated petitioner's constitutional rights. ***Eddings v. Oklahoma***, *supra*, 455 U.S. *at* 110; ***Lockett v. Ohio***, *supra*, 438 U.S. *at* 604. The decision to not present evidence on petitioner's history of prior criminal activity, or lack thereof, was a part of the trial strategies by petitioner's counsel and the prosecution (Resp. Exh. G, *at* 29-30; Tr. 711-14.) Therefore, the Court need not address the possible extent to which the state could have properly introduced evidence of petitioner's history of prior criminal activity. Without argument, the state would have been permitted to show criminal activity by petitioner as an adult which had not ripened into conviction. The presence of other felonies committed by petitioner while an adult was remarked upon by Judge Blackmar in the direct appeal of petitioner's conviction and sentence. ***State of Missouri v. Lashley***, *supra*, 667. S.W.2d *at* 717 (Blackmar, J., concurring in party and dissenting in part).

Federal habeas relief would not issue on petitioner's seventh claim even if the trial court had erred by refusing to submit the jury instruction.

> In a §2254 habeas corpus proceeding, a federal court's review of alleged due process violations stemming from a state court conviction is narrow. The petitioner must show that the alleged improprieties were "so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair." . . . To carry that burden, the petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial - i.e., that absent the alleged impropriety the verdict probably would have been different. . . .

Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.) (en banc)

(footnote and citations omitted), *cert. denied*, 107 S.Ct. 3270 (1987). Petitioner is unable to show that the outcome in the penalty phase "probably would have been different" had the instruction been submitted to the jury. A jury is presumed to reach a verdict based upon the law and facts presented to it. *See, e.g.*, ***Wainwright v. Witt***, 469 U.S. 412, 423 (1984) (See *original*). At the penalty phase of petitioner's trial there was no evidence presented to support the proffered jury instruction. Because petitioner cannot meet his burden in demonstrating that the outcome of the penalty phase would probably have been different, his instant seventh claim for federal habeas corpus relief should be denied.

* * *

Because the record clearly demonstrates that petitioner is not entitled to federal habeas relief on his instant grounds 2, 3, 7, 8, 12, or 13, an evidentiary hearing is not now required. In sum, this petition for a writ of habeas ocrpus should be denied as to petitioner's instant claims 2, 3, 7, 8, 12, and 13.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that peititoner's federal habeas grounds 4, 6, and 9, be barred from review by the Court in his proceeding. It is further recommended that petitioner's grounds 5 and 11 be struck by the Court for failure to raise any constitutional claim with respect to those grounds. It is further recommended that the instant petition be stayed until the Supreme Court issues its opinion in ***Thompson v. Oklahoma***. Petitioner's grounds 2, 3, 7, 8, 12, and 13 should be denied on the merits. Finally, petitioner's motion for an evidentiary hearing should also be denied. The parties are advised that they have eleven (11) days in which to file written

objections to this Report and Recommendation.

/s/ David D. Noce
UNITED STATES MAGISTRATE

Signed this 29th day of March, 1988.

STATE of Missouri, Respondent
v.
Frederick LASHLEY, Appellant.

No. 63994.

Supreme Court of Missouri,
En Banc.

March 20, 1984.

Rehearing Denied April 16, 1984.

BILLINGS, Judge.

Defendant Frederick Lashley, 17, was convicted of the capital murder of his physically handicapped 55-year-old cousin and foster mother, Janie Tracy, while robbing her of $15. The punishment prescribed by the jury and approved by the trial court is death. We affirm.

The victim lived alone in a downstairs apartment in the City of St. Louis. She had heart trouble, diabetes and a neuromuscular problem that caused her to limp and required her to use a walking cane. She had difficulty walking since she had undergone a brain operation a number of years ago. The operation had resulted in the removal of a portion of her skull on the left side of her head. Defendant had lived with and been cared for by Miss Tracy (and her mother) from the time he was two years of age until he was sixteen years old. He had been present on occasions when there had been discussions concerning the soft spot on Miss Tracy's head.

On the night of April 9, 1981, Miss Tracy was visiting her sister, Mrs. Williams, who lived several blocks from the

Tracy apartment. Sometime before 8:30 p.m., defendant entered the apartment by climbing through the top of a window on the rear porch. He unscrewed the light bulb in the front room so that the light would not come on when the switch was turned on. His admitted purpose was to ambush Miss Tracy and take her money when she returned home. Defendant, armed with a cast iron skillet (and the jury could reasonably find he also had a butcher knife having a seven and one-half inch blade), waited in the dark in the bedroom adjacent to the front room.

Miss Tracy left her sister's home between 8:00 and 8:30 p.m., driving her car. In his confessions to the police, one of which was videotaped, defendant stated that when Miss Tracy entered the front door of the apartment she attempted to turn on the light. When the light did not come on she started into the room where defendant was waiting. As she reached for the light switch he struck her in the head with the iron skillet, breaking it into two pieces. He said she fell and began screaming and he put his hand over her mouth. When asked where the knife came from the defendant stated:

> Off the floor. It was on-well, really it was on the floor. That's-I mean, you know, I just see the knife and then I grabbed it, you know. And then she had it in her hand. We both had it. And then I finally got it-got it back and then that's when I stuck her with it.

Defendant took $15 and car keys from Miss Tracy's purse, locked the front door on the way out of the apartment, and drove off in the victim's automobile. He was apprehended while driving the stolen vehicle shortly after midnight.

An upstairs neighbor of Miss Tracy, Mrs. Ali, 81, had heard screams followed by something which sounded "like a

fall" from the downstairs apartment. She telephoned the Tracy apartment and when she did not get an answer, called Mrs. Williams to come over and investigate. Mrs. Williams and her husband went to her sister's apartment shortly after 8:30 p.m. Mrs. Williams noticed her sister's car was not parked outside. She had a key to the apartment and upon entering it, saw her sister on the floor of the bedroom, bleeding about the head. She also saw a butcher knife near Miss Tracy and a broken skillet on the bedroom floor. Police and medical assistance were immediately summoned.

Hospital records showed Miss Tracy was comatose and brain dead when she arrived at the hospital. She had a cut on her head above the right ear, "defense" knife cuts on her fingers, and a one-inch incision above her left ear where the knife entered her skull through the soft spot and penetrated her brain. This stab wound caused her death approximately 48 hours later.

Defendant did not testify at trial but his written and videotaped confessions were introduced by the State.[1] In both he admitted striking the defenseless woman with the skillet with sufficient force to knock her down and then plunged the butcher knife into her head. Consequently, his claimed error in the admission into evidence of a small hammer that was found by an evidence technician near a piece of the iron skillet need not long detain us. A photograph showing the hammer and piece of skillet had already been received in evidence-without objection. As a physical object found at or near the scene of the crime, and of a type that could have been used to deliver a felling blow, we cannot say the hammer had no relevancy or probative value. See State v. Neal, 591 S.W.2d 178, 180 (Mo.App. 1979). Defendant

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[1] There was substantial evidence that defendant was fully and completely Miranda-ized and that his confessions met constitutional standards.

does not demonstrate how or in what manner he was prejudiced by the hammer being received in evidence and we note that the only mention of the hammer in closing arguments was made by defense counsel. In any event, it is beyond dispute that the butcher knife wielded by the defendant was the death weapon. The point is denied.

Defendant next launches a broadside attack on the ''Witherspooning'' [Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1170, 20 L.Ed.2d 776 (1968)] of the jury panel in the guilt stage of the trial and further contends that because of the prejudice resulting from such he was entitled to a different jury for the penalty phase of the trial. We considered and rejected identical contentions in State v. Guinan, 665 S.W.2d 325 (Mo. banc 1984). The point is denied.

At the punishment phase of trial, the court gave Instruction No. 20 to the jury for their determination of whether the State proved, beyond a reasonable doubt, that the defendant murdered Janie Tracy for the purpose of receiving money or any other thing of monetary value. The jury initially returned and presented the court with a verdict form which stated ''there was no evidence to disprove he entered the house for the reason of obtaining money''. The experienced trial judge told the jury the verdict was not in the proper form and requested them to retire and read the instructions. Defense counsel, although agreeing ''the verdict is improper'', objected to the court's returning the jury for further deliberations, and moved for a mistrial, which was overruled. The jury thereafter returned the verdict form accepted by the trial court in this case.

Defendant first argues that the trial court's failure to accept the original punishment verdict as an acquittal of the statutory aggravating circumstance was erroneous because the original punishment verdict form returned indicated that the

jury had shifted the burden of proof and constituted a finding against the State as to the aggravating circumstance submitted. Next, defendant argues the improper wording of the aggravating circumstance verdict form showed that the jury did not find beyond a reasonable doubt the aggravating circumstance submitted and, therefore, the death penalty cannot be assessed because the jury's finding as to the aggravating circumstance is controlling over its intention to assess the death penalty. Finally, defendant argues that the trial court erred in telling the jury that the verdict was in improper form because this amounted to a directed verdict for the State and a comment on the evidence.

The law is clear that when a jury returns a verdict in improper form, it is the *duty* of the trial court to refuse to accept the same and require further deliberations until a verdict in proper form is returned. State v. Helm, 624 S.W.2d 513, 519 (Mo.App. 1981). The jury's verdict is not binding until it is accepted by the court and the jury discharged. State v. Hurley, 602 S.W.2d 838, 839-40 (Mo.App. 1980). Consequently, there is no merit in defendant's claim that he was ''acquitted'' of the statutory aggravating circumstance by the jury's improperly worded verdict form. Further, the return of a verdict in improper form and the refusal by the trial court to accept it is not a situation which places a defendant in double jeopardy. State v. Jones, 583 S.W.2d 561, 562 (Mo.App. 1979); State v. Summers, 501 S.W.2d 548, 550-51 (Mo.App. 1973). The verdict form *accepted* by the court found the statutory aggravating circumstance that authorized the imposition of the ultimate penalty.

The trial judge in this case not only correctly directed the jury to further deliberate and return a verdict in proper form, but was careful to not prejudice the defendant in any manner in so doing. The court merely told the jury that the verdict was not

in proper form and asked them to retire and read the instructions. The court in no manner indicated to the jury why the verdict was not in proper form, and clearly did not indicate his desires as to the form that they should return. The court could not have handled the situation in a more neutral manner. The point is denied.

Defendant contends the court committed reversible error in refusing to give his tendered instruction on mitigating circumstances which included the mitigating circumstance of defendant having no significant history of prior criminal activities.

At the instruction conference defense counsel and the prosecutor discussed the admissibility of defendant's juvenile record. As a result of defendant's counsel stating she was not going to delve into her client's juvenile record and the prosecutor's stating he did not intend to do so unless defense witnesses stated defendant had no prior criminal history, it was defense counsel's position that the absence of any criminal history being adduced warranted the instruction. Defendant's position is refuted by the italized [sic] language contained in MAI-CR 2d 15.44 which specifically states statutory mitigating circumstances are to be supported by the evidence. We so held in State v. Battle, 661 S.W.2d 487, 492 (Mo. banc 1983). There being no evidence to support the statutory mitigating circumstance, the trial court correctly refused defendant's proffered instruction.

Defendant's final point is that the sentence of death is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Our review of the imposition of the death penalty is mandated by § 565.014, RSMo 1978. Such a review includes

the entire record and transcript and the report prepared by the trial judge. State v. Battle, 661 S.W.2d at 493.

Defendant does not suggest nor do we find that the ultimate penalty resulted from passion, prejudice, or any other arbitrary factor. There is substantial evidence to support the jury's finding of the statutory aggravating circumstance beyond a reasonable doubt. The facts and circumstances clearly demonstrate that the defendant deliberately and with premeditation brutally took the life of the physically infirm woman, who for many years had care for and reared him, in order to rob her. He unlawfully entered her home knowing she was not present and laid in wait for her, after setting the stage by unscrewing the front room light. He possessed a cast iron skillet he had found on the kitchen stove, and, inferentially, a butcher knife from the kitchen. When she entered the darkened bedroom he struck her with sufficient force to break the iron skillet into two pieces. He then plunged the knife into the defective portion of her skull, the seven and one-half inch blade penetrating her brain. The savage thrust of the knife resulted in rendering her brain dead by the time she was received in the emergency room of the hospital. Defendant then took the victim's money and car keys and drove away in her car. He and a friend got something to "drink" with two dollars of his ill-gotten gains and were joyriding in the stolen vehicle when apprehended by officers. By his deliberate and premeditated acts, the defendant demonstrated a callous and marked indifference to human life.

As we held in State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983), and reaffirmed in Battle, death-waived cases are not relevant in our proportionality review and defendant's citation of such cases do not aid him. In cases involving the statutory aggravating circumstance of murder for the purpose of receiving money or any other thing of monetary value,

none approach the classic lying in wait of the defendant in this case to kill a helpless and crippled middle-aged woman for her money. See State v. McDonald, 661 S.W.2d 497 (Mo. banc 1983); State v. Gilmore, 661 S.W.2d 519 (Mo. banc 1983).

During the sentencing phase of defendant's trial and in brief and oral argument to this Court, the age of the defendant at the time of the murder was heavily stressed as a mitigating factor with the obvious hope that the lesser penalty for capital murder would be forthcoming. The jury resolved the matter against the defendant. The trial judge, in his report to this Court said:

> Under the facts of the case considered in the light of the brutal aspects contained therein, the sentence is an appropriate one even though the defendant is a young person.

Defendant was 17 years and one month old at the time of the killing. He is now 20 years old. He had completed the 12th grade in school and is considered average in intelligence. From age 13 to 16 he was committed by juvenile authorities to various institutions on several occasions for violating the law. While in custody for the present offense he told officers he had committed several felonies after attaining adult status.

What we said in State v. Battle, supra, at 494, on the matter of the death penalty and the defendant's age, is equally applicable in this case.

The judgment is affirmed.

RENDLEN, C.J., and WELLIVER, HIGGINS, GUNN and DONNELLY, JJ., concur.

BLACKMAR, J., concurs in part and dissents in part in separate opinion filed.

BLACKMAR, Judge, concurring in part and dissenting in part.

I am uneasy with the suggestion in the principal opinion that the defendant has the burden of introducing evidence in support of the mitigating circumstance set out in § 565.012.3.(1) [sic], RSMo Cum.Supp. 1982, as follows:

> The defendant had no significant history of prior criminal activity.

There should be a rebuttable presumption that a defendant has no such significant history. It is established law, furthermore, that a juvenile record does not constitute "criminal activity." Section 211.271, RSMo 1978. See State ex rel. R.L.W. v. Billings, 451 S.W.2d 125, 127 (Mo. banc 1970); State ex rel. Whittaker v. Webb, 605 S.W.2d 179, 182-83 (Mo.App. 1980); In re C___, 314 S.W.2d 756, 760 (Mo.App. 1958).

Section 565.012.3.(1) [sic], however, refers to "criminal activity" and not to "convictions." The state should be able to show criminal activity which has not ripened into conviction, subject to the trial court's discretion to control the scope of the trial to keep it from getting too far out of bounds. There are indications in the record before us of other felonies committed by the defendant while an adult, but these may not have been offered into evidence during the trial. Because of the Court's vote I have not further explored the possibility that remand for the taking of further evidence might show that the trial court properly refused to instruct on absence of criminal conduct.

I adhere to the views expressed in State v. Battle, 661 S.W.2d 487, 495 (Mo. banc 1983) as to the imposition of a death sentence on a very young offender, and cannot add to these views except to say that Battle's offense was much more gruesome.

The principal opinion refers to deliberateness as demonstrated by "lying in wait." The case is not so aggravated as State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982), in which the defendant stalked the victim on two occasions and then shot him repeatedly, in order to collect a promised $1,000. I believe that this defendant's extreme youth is a circumstance comparable to McIlvoy's demonstrated susceptibility to influence, as shown by expensive psychiatric testimony. I reiterate my observations in State v. McDonald, 661 S.W.2d 497, 518 (Mo. banc 1983), as to the reluctance of juries to impose death sentences when the sole statutory aggravating circumstance is robbery. State v. Gilmore, 661 S.W.2d 519 (Mo. banc 1983) is not at all comparable to this case.

It appears that I am out of step with the majority of the Court in sentence review under § 565.014, RSMo 1978. I believe that, under that section, we are obliged to exercise independent judgment, rather than simply determining whether the jury's recommendation is supported by the record. As in McDonald and Battle, I would set aside the death sentence in this case, but would affirm the conviction.

90-1036EMSL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FREDERICK LASHLEY,
Appellant,

vs.

WILLIAM ARMONTROUT, WARDEN,
MISSOURI DEPARTMENT OF CORRECTIONS [SIC],
Appellee.

On Appeal from the United States District Court for the
Eastern District of Missouri, Eastern Division
The Honorable Edward L. Filippine, Judge

APPELLEE'S PETITION FOR REHEARING OR REHEARING EN BANC AND SUGGESTIONS IN SUPPORT THEREOF

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FREDERICK LASHLEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. 90-1036EMSL**
	)	
WILLIAM ARMONTROUT, WARDEN,	)	
	)	
Appellee.	)	

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, PETITION FOR REHEARING EN BANC

COMES NOW appellee, by and through counsel, pursuant to Federal Rules of Appellate Procedure 35 and 40 and Eighth Circuit Rules 35A and 40A, and requests this Court to grant rehearing or rehearing *en banc* in the above-styled case. Appellee states the following:

1. The panel opinion in the above-styled case conflicts with opinions of the United States Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Walton v. Arizona*, 110 S.Ct. 3047 (1990); and *Estelle v. McGuire*, 112 S.Ct. 475 (1991). Rehearing or rehearing *en banc* is necessary to maintain uniformity of this Court's decisions. Fed.R.App.P. 35(a)(1); Eighth Circuit Rule 35A(a).

2. The panel opinion is the above-styled case involves questions of exceptional public importance since the opinion improperly discounts and seemingly ignores the Missouri Supreme Court's good-faith, reasonable decision on this issue, an issue primarily of state law. This significant issue justifies rehearing or rehearing *en banc*. Fed.R.App.P. 35(a)(2); Eighth Circuit Rule 35A(a).

SUGGESTIONS IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING OR, IN THE ALTERNATIVE, PETITION FOR REHEARING EN BANC

COMES NOW appellee, by and through counsel, and states as follows in support of his petition for rehearing or rehearing *en banc* in the above-styled cause.

The standard for granting a petition for a rehearing or rehearing *en banc* is strict. *See Powell v. National Football League*, 888 F.2d 559, 572 (8th Cir. 1990) (Lay, C.J., dissenting). In this case, appellee believes that rehearing or rehearing *en banc* is necessary due to the conflict between the majority panel opinion as to Part H and case law previously announced by this Court, other Circuit Courts of Appeal, and the United States Supreme Court. Additionally, the panel's conclusion oversteps the bounds of a court sitting in federal habeas corpus jurisdiction and undermines both the Congressional policy defining federal habeas corpus actions and the Constitutional consideration of federal-state comity underlying the applicable statutes and rules. The decision of the panel majority in Part H of this Court's opinion presents an issue of exceptional importance worthy of rehearing or rehearing *en banc*. Fed.R.App.P. 35(a), 40; Eighth Circuit Rules 35A(a), 40A(a).

Appellant was convicted by a Missouri jury of capital murder. The panel opinion in this case summarized the facts as

follows:

> Lashley "brutally took the life of [a] physically infirm woman, who for many years had cared for and reared him, in order to rob her." *State v. Lashley*, 667 S.W.2d 712, 716 (Mo. [banc]), *cert. denied*, 469 U.S. 873 (1984). Lashley broke into his foster mother's home while she was away, darkened the front room, and lay in wait. When his foster mother returned, he struck her over the head with a cast-iron skillet, using enough force to break the skillet into two pieces. She fell to the floor, and a struggle ensued. Knowing his foster mother had a soft spot in her skull, Lashley ended the struggle by plunging a butcher knife into this vulnerable area. He then stole $15 from his foster mother's purse, took the keys to her car, and departed. Lashley's foster mother died two days later.

Lashley v. Armontrout, No. 90-1036EM (8th Cir. Mar. 4, 1992), slip op. at 2 (hereinafter "*Lashley*"). After a separte punishment-phase hearing,the trial judge sentenced appellant to death as per the jury's recommendation. The Supreme Court of Missouri affirmed appellant's conviction and his sentence of death. *State v. Lashley*, 667 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873 (1984). Appellant, thereafter, unsuccessfully sought post-conviction relief in the sentencing court, the Circuit Court of St. Louis City, Missouri. That court denied appellant relief and the denial was affirmed on appeal. *Lashley v. State*, 721 S.W.2d 31 (Mo. App., E.D. 1986), *cert. denied*, 481 U.S. 1024 (1987).

After the denial of relief, appellant brought a federal habeas corpus action in the United States District Court for the

Eastern District of Missouri, Eastern Division. The district court rejected appellant's request. On an appeal from the denial of relief, a panel of this Court ruled that it was an error of constitutional dimension for the Missouri circuit court to have refused to give a mitigating-circumstance instruction requested by appellant. The instruction requested would have told the jury that the defendant "has no significant history of prior criminal activity." §565.012.3(1), RSMo Cum.Supp. 1982. *Lashley*, slip op. at 10-12. Two judges of the panel held that Eighth Amendment principles, as defined in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), "obligated the Missouri trial court to give the requested instruction, if it was warranted by the evidence." *Lashley*, slip op. at 11. The two-judge majority went on to hold that under the facts of appellant's case, the evidence warranted the instruction. *Id.*, at 11-12.

The decision of the two-judge majority is inconsistent with the Supreme Court's Eighth Amendment jurisprudence and, additionally, fatally overlooks Missouri law governing the procedures applied in this case. These serious errors by the panel majority, as to Part H, should be re-examined by the panel or by the Court *en banc*.

First, in its ruling, the Court appears to have inappropriately blended Eighth Amendment concepts with Missouri procedural rules. The panel held:

> *Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it. The evidence before the jury in this case presented a blank slate. As far as the jury was concerned, Lashley had no significant history of prior criminal activity, and, therefore, he was entitled to have the jury consider that fact

> as a mitigating circumstance. The trial judge's failure to give the requested instruction under these circumstances violated the defendant's Eighth Amendment rights as expressed in *Lockett*.

Lashley, slip op. at 11-12. To be sure, the Supreme Court in *Lockett* held that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant *proffers* as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. at 604 (emphasis added, footnote omitted). *Lockett* has by no means been the Supreme Court's last word on mitigating circumstances; it does not even address the separate question of jury instructions. The panel's failure even to recognize the Supreme Court's subsequent, more applicable, decisions reflects an institutional or methodological flaw in the panel's opinion which, itself, justifies rehearing.

The requirement from *Lockett*, contrary to the panel's opinion, does not mandate instructing on a mitigating factor that has not been supported by evidence presented by the defendant. The Supreme Court has determined that the sentencer must be allowed to consider and give effect to any mitigating evidence presented by the defendant. *See Penry v. Lynaugh*, 109 S.Ct. 2934, 2947 (1989).

The Court, however, has expressly held that "*Lockett* does not hold that the State has no role in structuring or giving

shape to the jury's consideration of these mitigating factors." *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion). "There is no . . . constitutional requirement of unfettered sentencing discretion in the jury and states are free to structure and shape consideration of mitigating evidence `in an effort to achieve a more rational and equitable administration of the death penalty.'" *Walton v. Arizona*, 110 S.Ct. 3047 (1990), *quoting*, *Boyde v. California*, 110 S.Ct. 1190 (1990). The Court has also noted that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." *Zant v. Stephens*, 462 U.S. 862, 890 (1983); *see also id.*, at 875, n. 13.[1]

As Judge Fagg noted in his opinion dissenting from Part H, ". . . the court mistakenly concludes *Lockett* obligated the state trial judge to give Lashley's requested mitigating circumstance instruction even though the record did not contain a shred of evidence to support it." *Lashley*, slip op. at 15 (Fagg, J., dissenting). Judge Fagg also correctly discussed the interplay between Missouri's procedural rules and the Eighth Amendment dictates discussed by the United States Supreme Court in *Lockett*, *supra*; *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and

[1] It would also appear that the holding of the panel in this case, mandating submission of an instruction when no evidence was presented to support the instruction, actually creates a "new rule" of constitutional law which was applied retroactively to appellant's case without having first satisfying the test enunciated in *Teaque v. Lane*, 489 U.S. 288 (1989). The result in this case is not the same as that reached by the Supreme Court in *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989). In *Penry*, the Supreme Court was confronted with a situation wherein the criminal defendant had presented evidence to support the giving of the instructions refused by the trial court. *Penry*, 109 S.Ct. at 2947. To extend *Penry* (or the Court's earlier Eighth Amendment cases such as *Lockett* and *Eddings*) to include the

(footnote continued)

Penry v. Lynaugh, 492 U.S. 302 (1989). Rehearing or rehearing *en banc* should be granted to consider that interplay.

By itself, the proposition that a sentencing jurisdiction must allow a jury to consider a specific mitigating circumstance does not dictate that the trial judge instruct the jury on that specific circumstance. If that were the law, the trial judge would have to instruct on every conceivable mitigating circumstance that was consistent with the evidence. But such a rule inherently conflicts with its underlying principle. If the trial judge must instruct on every operative circumstance in mitigation, this would limit the defendant's right to have circumstances considered to those which the judges, lawyers, and legislators have agreed to "count."

Sentencing jurisdictions may require that mitigating circumstance instructions be supported by some evidence. Judge Fagg states the rule, correctly, as being that "[d]ue process requires that state trial courts give mitigating circumstance instructions only when the evidence warrants those instructions." In support of this rule he refers the reader to *Hopper v. Evans*, 456 U.S. 605, 611 (1982). *Lashley*, slip op. at 13-14. In *Hopper*, the Supreme Court addressed the analogous issue of a lesser-included-offense instruction, and held (in pertinent part) that "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction" (emphasis in original). What unites the rule cited from *Hopper* and the point Judge Fagg made in the instant case is that the giving of jury instructions--even in a capital case--is to be decided according to the facts of the case and the law of the sentencing jurisdiction. It is not simply to be required whenever doing so might result in a verdict other than

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(footnote continued)
facts of this case clearly violates the precepts of *Teague*. This is yet another reason rehearing or rehearing *en banc* should be granted.

one of capital punishment.

Under Missouri procedure, an instruction may be given only if it is supported by the evidence. *State v. Battle*, 661 S.W.2d 487, 492 (Mo. banc 1983), *cert. denied*, 466 U.S. 993 (1984); *State v. Daugherty*, 631 S.W.2d 637, 639 (Mo. 1982). In fact, the Notes on Use to the Missouri Approved Instruction on this issue (MAI-CR 2d 15.44) specifically authorizes submission of the instruction only "if there is evidence supporting" statutory mitigating circumstances or any mitigating circumstance or circumstances "authorized by law." *See* MAI-CR 2d 15.44, Notes on Use 3, 4. In deciding appellant's issue on direct appeal, the Missouri Supreme Court found that there was "no evidence to support the statutory mitigating circumstance . . .." *State v. Lashley*, 667 S.W.2d at 715-716.[2]

Appellant was not prohibited from presenting any potential mitigating evidence to the jury in this case. Instead, appellant made a reasonable strategic decision to forego presentation of that evidence and thereby alleviate any possible evidence being presented by the prosecution involving, as Judge Blackmar noted, "other felonies committed by the defendant while an adult . . .." *State v. Lashley*, 667 S.W.2d at 717 (Blackmar, J., concurring in part and dissenting in part). The choice made by appellant, however, does not violate the precepts of *Lockett v. Ohio*, 438 U.S. at 604; *see also Eddings v. Oklahoma*, 455 U.S. at 112; *Penry v. Lynaugh, supra*.

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[2] In fact, Judge Blackmar, in an opinion concurring in part and dissenting in part, went so far as to state, "[t]here are indications in the record before us of other felonies committed by the defendant while an adult, but these may not have been offered into evidence during the trial." *State v. Lashley*, 667 S.W.2d at 717 (Blackmar, J., concurring in part and dissenting in part). This statement certainly indicates that had appellant attempted to present evidence at the punishment phase that he had no

(footnote continued)

As the dissent correctly points out in discussing Part H, the Supreme Court has held "the constitution is not violated when a state requires capital defendants to bear [the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases]." *Lashely*, slip op. at 14 (Fagg, J., dissenting opinion), *citing*, *Walton v. Arizona*, 110 S.Ct. 3047, 3055 (1990) (plurality); *see also id.*, 110 S.Ct. at 3066-3068 (Scalia, J., concurring). The opinion of the two-judge majority on this issue should be reheard so as to take into consideration the State of Missouri's procedural requirements as they relate to the Eighth Amendment principles upon which the majority purports to base its decision.

Additionally, appellee wonders if the holding of the two-judge majority on Part H is one based upon principles of federal constitutional law or is one improperly deciding an issue of state law not within the province of a court sitting in habeas corpus jurisdiction. Recently, the United States Supreme Court has reaffirmed that "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 112 S.Ct. 475, 480 (1991), *quoting*, *Lewis v. Jeffers*, 110 S.Ct. 3092, 3102 (1990).

On surprisingly similar facts, the United States Court of Appeals for the Fourth Circuit has determined that the failure of a state trial court "to tell the jury that it could consider the defendant's clean criminal record as a mitigating factor . . ." would at most be ". . . an error of state law which is not cognizable by a federal court." *Hutchins v. Garrison*, 724 F.2d 1425, 1436-1437 (4th Cir. 1983), *cert. denied*, *stay denied*, 464 U.S. 1065 (1984); *see also Briley v. Bass*, 750 F.2d 1238, 1244

(footnote continued)
significant history of prior criminal activity, the State would have been able to rebut that evidence. The "blank slate" referred to by the panel was blank only because appellant strategically decided it would be better to leave the slate blank than cloud it with evidence of what the jury might consider as aggravating factors instead of mitigating circumstances.

(4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985).

By failing to give deference to the reasonable, good-faith decision of the Missouri Supreme Court in considering this allegation, the panel has incorrectly decided this issue. *See Brecht v. Abrahamson*, 944 F.2d 1363, 1367 (7th Cir. 1991). Just as in *Brecht*, the panel in this case has

> substituted [their] assessment for that of the Supreme Court of [Missouri]: [They] did not say that its opinion is unreasoned or beyond the bounds of dispute; [they] simply disagreed. That is not an appropriate stance for a federal [court] engaged in collateral review of a state conviction. "[R]espect for a state court's findings of fact and application of its own law counsels against the sort of *de novo* review undertaken" by the [panel in this case].

Brecht v. Abrahamson, 944 F.2d at 1367, *quoting*, *Lewis v. Jeffers*, 110 S.Ct. at 3102.

The Supreme Court has recently granted certiorari review on a case from the Fourth Circuit with the first question for review being whether a federal court may grant collateral relief merely because it disagrees with a good-faith, reasonable decision of a state court? *See Wright v. West*, 112 S.Ct. 656 (1991); 50 Crim.L.Rptr. 3109 (Dec. 18, 1991).[3]

As previously discussed, the Missouri Supreme Court engaged in an extensive and reasonable discussion of this allegation as it was presented on the direct appeal of his judgment of conviction and sentence. *State v. Lashley*, 667

[3] A separate question was added by the Court to determine if the federal court should give deference to the state court's determination or if the court should review the issue *de novo*. *Wright v. West*, 112 S.Ct. 672 (1991).

S.W.2d at 715-716.[4]

Finally, even if the majority's opinion were accurate and even if it were true that the determination by the Supreme Court of Missouri had no effect on this issue, the majority's analysis is incomplete as any error in refusing the instruction has not deprived petitioner of due process and, stated otherwise, would constitute harmless error beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967) (discussing the harmless-beyond-a-reasonable doubt standard); *Hamilton v. Nix*, 809 F.2d 463, 470 (8th Cir.) (*en banc*), *cert. denied*, 483 U.S. 463 (1987 (discussing the fundamentally unfair standard with relation to a due process violation). It has been held that harmless-error analysis applies to Eighth Amendment challenges to penalty-phase jury instructions. *See Demps v. Dugger*, 874 F.2d 1385 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 1834 (1990); *see generally Yates v. Evatt*, 111 S.Ct. 1884 (1991) (discussing harmlessness of burden-shifting instructions).

The Supreme Court has repeatedly recognized that in reviewing jury instructions, a single incident may not be revived in artificial isolation, but must be viewed in the context of the overall charge. *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973); *Estelle v. McGuire*, 112 S.Ct. at 482.

Taken as a whole, it cannot be said that there is "a reasonable likelihood" that the jury has been deprived of consideration of any mitigating factor. In fact, in addition to specifically being instructed that they could consider the age of

[4] Again, as Judge Blackmar noted in his separate opinion, "[t]here are indications in the record before us of other felonies committed by the defendant while an adult . . . ." *Id.* at 717 (Blackmar, J., concurring in part, dissenting in part). Appellant could not gather even one vote from the Missouri Supreme Court to support his position that there was evidence to support the submission of his requested instruction. The reasonable, good-faith decision of the Supreme Court of Missouri should be given deference in this Court.

the defendant at the time of the offense as a mitigating circumstance, the jury was also instructed that they could consider "any circumstances" which were found from the evidence "in extenuation or mitigation of punishment" (Appellee's District Court Exhibit B at pp. 81, 82). The jury was also provided with a specific life-option instruction in this case which read:

> Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

(Exh.B, pp. 83-84). Even in the absence of a specific listing of the mitigating circumstance in question (lack of significant history of prior criminal activity), the full charge submitted to the jury by the circuit court comports with constitutional requirements. *See Blystone v. Pennsylvania*, 110 S.Ct. 1078, 1084 (1990); *Jones v. Murray*, 947 F.2d 1106, 1119-1120 (9th Cir. 1991) *cert. pending*, No. 91-7186 (U.S.); *cf. Peek v. Kemp*, 784 F.2d 1479, 1491-1493 (11th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 939 (1986). The jury in appellant's case was given the opportunity to consider and give effect to any factor they felt would have mitigated punishment in this case.

If this "blank slate" is so significant that it is evidence for the purpose of satisfying the panel's *Lockett* analysis, then it cannot have been lost on the jury. The trial judge instructed the jury that it could consider in mitigation "any circumstances" found from the evidence. For the very reason the panel relies on in striking down the judgments of the jury, the trial judge, the Missouri Supreme Court on direct appeal and the federal district court--*i.e.*, the substantive salience of the absence of serious prior criminal activity--the jury may not blithely be presumed to have ignored it. Yet, that is the effect of

the panel's holding on this issue: From the fact that no evidence of serious prior criminal activity was presented to the jury and the law (undisputed by any participant in these proceedings) that the jury could consider this circumstance, the panel leaps to the result that the trial court had to instruct on this specific mitigating circumstance, in addition to giving the more inclusive mitigating-circumstance instruction and the life-option instruction. What the panel would establish as the law is not that the jury may consider the absence of serious prior criminal activity, but that it must be specially instructed to do so--even when defense counsel does not proffer such evidence to the jury.

At page 11 of the slip opinion, the panel identifies, by indirection, what is has actually done: It is seeking to enforce its view of Missouri law--specifically, the instructions that Missouri law requires the trial judge to give--even though the Missouri Supreme Court took a different position. This Court has made clear, however, that "[Missouri law] is what the Supreme Court of Missouri says it is." *Byrd v. Delo*, 942 F.2d 1226, 1232 (8th Cir.), *stay denied*, 112 S.Ct. 17 (1991).

Any error in the trial court's failure to submit the requested instruction was harmless error beyond a reasonable doubt. The majority's opinion has missed the mark with respect to Part H. This Court should grant rehearing or rehearing *en banc*.

REQUIRED STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Walton v. Arizona*, 110 S.Ct. 3047 (1990).

Further, I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

(1) Whether the Eighth Amendment requires submission of a mitigating-circumstance instruction when the record before the finder of fact is completely devoid of evidence to support such an instruction?

(2) Whether Missouri's procedural rule requiring a capital defendant to bear the risk of nonpersuasion as to the existence of mitigating circumstances comports with constitutional standards?

(3) Whether the State is required to rebut a non-existent presumption that a "blank slate" supports submission of a mitigating circumstance instruction on a defendant having no significant history of prior criminal activity?

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 16th day of March, 1992, to:

Mr. H. William Brown
Brown, Miller & Sheehan
117 N. Kirkwood, Ste. 200
Kirkwood, MO 63122

Ronald L. Jurgeson

Respectfully Submitted,
WILLIAM L. WEBSTER
Attorney General

RONALD L. JURGESON
Assistant Attorney General
Missouri Bar No. 35431

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, MO 64111
(816) 531 4207
Attorneys for Respondent.

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT — District: Eastern District of Missouri

Name: Frederick Lashley — Prisoner No.: CP 16
Case No. 87-0897-C-2

Place of Confinement: Death Row
Missouri State Penitentiary
Jefferson City, MO 65101

Name of Petitioner (include name under which convicted)

Frederick Lashley

Name of Respondent (authorized person having custody of petitioner)

William Armontrout
Warden Missouri Department of Corrections
Jefferson City, MO 65101

The Attorney General of the State of: Missouri

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Circuit Court of the City of St. Louis, St. Louis, Missouri

2. Date of judgment of conviction: April 26, 1982

3. Length of sentence: Death

4. Nature of offense involved (all counts): Capital Murder

5. What was your plea (Check one)
   (a) Not guilty X
   (b) Guilty
   (c) Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. If you pleaded guilty, what kind of trial did you have? (Check one)
   (a) Jury X
   (b) Judge only

7. Did you testify at the trial?
   Yes ___ No X

8. Did you appeal from the judgment of conviction?
   Yes X No ____

9. If you did appeal, answer the following:
   (a) Name of court: Missouri Supreme Court
   (b) Result: Conviction Affirmed
   (c) Date of result and citation, if known: March 20, 1984, State v. Lashley, 677 S.W.2d 712 (Mo banc 1984)
   (d) Grounds raised: Trial court erred in admitting hammer into evidence; trial court erred in overruling the challenge to death qualification voir dire question; trial court erred in not accepting original punishment verdict as an acquittal; disproportionate punishment; failure to submit mitigating circumstances.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court - n/a

(2) Result - n/a

(3) Date of result and citation if known - n/a

(4) Grounds raised - n/a

(f) If you filed a petition for certiorari in the United Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court - Missouri Supreme Court

(2) Result - Certiorari Denied.

(3) Date of result and citation, if known - Not known

(4) Grounds raised: Double jeopardy; violation of due process in that juvenile record was used against petitioner -- no aggravating circumstance was found beyond a reasonable doubt by jury; cruel and unusual punishment to impose death penalty.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes X No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Circuit Court of the City of St. Louis, St. Louis, Missouri

(2)Nature of proceeding: Motion pursuant to Missouri Supreme Court Rule 27.26 to set aside or vacate judgment and sentence

(3) Grounds raised: Ineffective assistance of counsel; violation of U.S. Constitution to execute a person who had not reached the age of

majority at the time of offense; State did not present evidence of any premeditation or deliberation as required by Missouri law.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes X No.

(5) Result: Petition denied - Lashley v. State, 721 S.W.2d 31 (Mo.App., E.D. 1986)

(6) Date of result: Affirmed by Missouri Court of Appeals, E.D. October 14, 1986

(b) As to any second petition, application or motion give the same information:

(1) Name of court - n/a

(2) Nature of proceeding - n/a

(3) Grounds raised - n/a

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No ___

(5) Result - n/a

(6) Date of Result - n/a

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes X No ___ Application for transfer to Missouri Supreme Court denied. Order entered January 13, 1987.

(2) Second petition, etc Yes____ No____

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

n/a

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b)Conviction obtained by use of coerced confession.

(c)Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d)Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e)Conviction obtained by a violation of the privilege against self-incrimination.

(f)Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g)Conviction obtained by a violation of the protection against double jeopardy.

(h)Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i)Denial of effective assistance of counsel.

(j)Denial of right of appeal.

A. Ground one: Petitioner was denied his rights under the 8th and 14th Amendments of the United States Constitution to be free of cruel and unusual punishment in that the United States Constitution prohibits the execution of a person who had not reached the age of majority at the time of the offense.

Supporting FACTS (state briefly without citing cases or law) Petitioner had just turned seventeen (17) years of age when the crime for which he was charged occurred. Petitioner was sentenced to death for said crime.

B. Ground two: Petitioner was denied effective assistance of counsel in violation of his 6th and 14th Amendments [sic] right under the United States Constitution in that Petitioner's trial attorneys failed to investigate and present the defense of diminished capacity.

Supporting FACTS (state briefly without citing cases or law): Section 562.076, RSMo, at the time of Petitioner's trial provided that a person who was in an intoxicated or drugged condition at the time of the offense was not criminally responsible if said intoxication negated the mental state of purpose or knowledge. Petitioner at the time of the offense was acting under the influence of P.C.P. Petitioner, Douglas Anderson, and Dianne Hurst were witnesses available at the time of Petitioner's trial to testify in regard to his intoxication by P.C.P. Dr. Parwartikar and Dr. Armour were available to testify that P.C.P. impairs a person's ability to reason and formulate intent. Petitioner's trial attorneys called none of the available witnesses at his trial; nor did they request jury instructions in regard to said defense.

C. Ground three: Petitioner was denied effective assistance of counsel in violation of his 6th and 14th Amendment rights of the United States Constitution in that his trial attorneys failed to present statutory mitigating evidence during the penalty phase of the trial.

Supporting FACTS (state briefly without citing cases or law): At the time of Petitioner's trial Section 565.062(3)(6), RSMo, provided that the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired could be submitted to the jury if supported by the evidence. At the time of petitioner's trial, Dr. Parwartikar was available to testify that Petitioner was between borderline and dull normal range of intelligence and that the effects of P.C.P. on Petitioner's ability to conform his conduct to the requirements of the law was impaired. Petitioner's attorneys failed to present said evidence and failed to request said mitigating circumstance be submitted to the jury.

D. Ground four: Petitioner was denied his right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments to the United State Constitution in that his trial attorneys failed to present evidence to support the statutory mitigating circumstance that Petitioner had no significant history of prior criminal activity.

Supporting FACTS (state briefly without citing cases or law). Section 565.012(3)(1), RSMo, provided that the mitigating circumstance that the accused had no significant history of criminal activity could be submitted to the jury during the sentencing phase of the trial. Petitioner had no criminal convictions and could have testified during the trial. Petitioner had no criminal convictions and could have testified during the trial. His trial attorneys would thus have been able to submit to the jury the statutory mitigating circumstance of no significant prior criminal activity. His attorneys failed to present any evidence which would have allowed them to receive said jury instruction.

(ADDITIONAL GROUNDS BEGINNING PAGE 8 ATTACHED HERETO)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ____ No X

15. Give the name and address, if known, of each attorney

who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: n/a
(b) At arraignment and plea: Kevin Curran, Erica Leisering, Office of Public Defender, 1320 Market St., St. Louis, MO, 63103 (314) 622-4241
(c) At trial: Kevin Curran, Erica Leisering, Office of Public Defender, 1320 Market Street, St. Louis, MO, 63103 (314) 622-4241
(d) At sentencing: Kevin Curran, Erica Leisering, Office of Public Defender, 1320 Market St., St. Louis, MO 63103 (314) 622-4241
(e) On appeal: Henry Robertson, Office of Public Defender, 1320 Market St., St. Louis, MO 63103 (314) 622-4241
(f) In any post-conviction proceeding: Stormy B. White, Office of Public Defender St. Louis County, Clayton, Mo 63105 (314) 889-2778
(g) On appeal form any adverse ruling in a post-conviction proceeding: Stormy B. White, Office of Public Defender, St. Louis County, Clayton, MO 63105 (314) 889-2778

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ___ No X

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ___ No X

(a) If so, give name and location of court which

imposed sentence to be served in the future: n/a
(b) Give date and length of the above sentence: n/a
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ___ No ___

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

(date)

/s/ Frederick Lashley
Signature of Petitioner

E. *Ground five*: Petitioner was denied his right to effective assistance of counsel, due process, and equal protection of the laws as guaranteed by the United States Constitution when the state court failed to permit his attorney to withdraw when there was a conflict of interest.

SUPPORTING FACTS: Petitioner was represented on the charge of capital murder by two attorneys from the Public Defender Office of the City of St. Louis, Missouri. Missouri Supreme Court Rule 27.26 provides that a judgment and sentence may be attacked and set aside and that counsel will be appointed for indigent persons. Denial of effective assistance of counsel is a

ground for setting aside a conviction. Petitioner, in his 27.26 motion, alleged that his public defenders were ineffective in his representation. The court appointed an attorney from the St. Louis County Public Defender Office to represent Petitioner on his 27.26 proceeding. All public defenders involved were employed by the same employer, worked together on mutual clients; and, in fact, petitioner's trial attorneys had participated in the training of the attorney appointed to represent Petitioner in his 27.26 proceeding. A clear conflict of interest existed in Petitioner's county public defender alleging and proving his trial attorney's ineffectiveness.

F.*Ground six*: Petitioner was denied his right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution when his attorneys failed to introduce evidence of the statutory mitigating circumstance that the felony was committed under the influence of extreme mental or emotional disturbance.

SUPPORTING FACTS: Section 565.012(3)(2) RSMo provided that a statutory mitigating circumstance to be given to the jury if supported by the evidence was that the capital felony occurred while the defendant was under the influence of extreme mental or emotional disturbance. At the time of the homicide, Petitioner was a seventeen (17) year old youth, living in the street, addicted to drugs, and no means to buy food or clothing. Petitioner's trial attorneys failed to presented evidence of Petitioner's extreme emotional disturbance to the jury and failed to request the statutory mitigating circumstance.

G.*Ground seven*: Petitioner was denied his rights to due process and equal protection as guaranteed by the United States Constitution when the trial court refused to submit to the jury

the statutory mitigating circumstance of the fact Petitioner had no significant history of prior criminal activity.

SUPPORTING FACTS: Petitioner at the time of the offense had just turned seventeen years of age and had no criminal convictions. The state at no time presented any evidence of criminal activity. The trial court, however, refused to submit the statutory mitigating circumstance to the jury that Petitioner had no significant history of criminal activity as provided by Section 565.012(3)(1), RSMo.

H.*Ground eight*: Petitioner was denied his rights of due process, equal protection, right to trial by jury, and rights against double jeopardy as guaranteed by the United States Constitution.

SUPPORTING FACTS: Section 565, RSMo, provides that to impose the death penalty, the jury must find the state has proved an aggravating circumstance beyond a reasonable doubt. After deliberating nearly four hours on the issue of punishment, the jury returned fixing the punishment at death and finding, "There was no evidence to disprove the fact that he entered the house for the reason of obtaining money." The trial court sent the jury back to put their verdict in proper form and denied Petitioner's motion for judgment of acquittal on the death penalty or for a mistrial on the issue of punishment.

I.*Ground nine*: Petitioner was denied his rights of due process and equal protection of the law and his right to confront witnesses against him as guaranteed by the United States Constitution when the State Court used petitioner's juvenile record against him.

SUPPORTING FACTS: The Missouri Supreme Court reviews all death sentences as required by Section

565.014 RSMo. Missouri law provides that evidence, records and reports of juvenile courts shall not be used in any matter whatsoever except in juvenile court, Section 211.271(3) RSMo. However, the Missouri Court used petitioner's juvenile record to affirm the death penalty.

J. *Ground ten:* Petitioner was denied his right to a fair and impartial jury when the State was allowed to introduce evidence whose only purpose was to inflame the jury and cause petitioner to be convicted on an improper basis.

SUPPORTING FACTS: Over the objection of petitioner, the State was allowed to introduce a hammer into evidence that was entirely unconnected with any injury to victim. Said evidence inflamed the jury and caused them to speculate that petitioner used it and the offense was more heinous and deliberate than the proper evidence showed.

K. *Ground eleven*: Petitioner has been denied his rights of due process and equal protection of the law as guaranteed by the United States Constitution in that the imposition of the death penalty in petitioner's case is totally disproportionate to other cases in which the death penalty was not imposed.

SUPPORTING FACTS: At the time of petitioner's offense he was a seventeen year old black youth with no criminal convictions. There was no showing that the victim suffered in any unusual way or was tortured. The State of Missouri routinely waives the death sentence or amends the charge to a lesser included offense of capital murder.

L. *Ground twelve*: Petitioner was denied his rights to due process and equal protection of the law as guaranteed by the United States Constitution in that the State obtained a conviction for capital murder without proving an essential element of the charge.

SUPPORTING FACTS: Petitioner went into victim's apartment without a weapon with no intent to kill anyone. The State introduced no evidence of any intent to kill, no evidence of premeditation or deliberation on the part of petitioner when he caused the death of the victim.

M. *Ground thirteen*: Petitioner was denied his rights of due process and equal protection as guaranteed by the United States Constitution when the state was allowed to improperly death qualify the jury panel.

SUPPORTING FACTS: During voir dire of petitioner's jury panel, the state was allowed to pick up a conviction prone jury by eliminating for cause those individuals who would not impose the death penalty. In addition, the state was improperly permitted to imply to the jury that they could impose the death penalty without finding a statutory aggravating circumstance beyond a reasonable doubt. As a result, the jury in petitioner's cause imposed the death penalty without finding a statutory aggravating circumstances beyond a reasonable doubt. Said aggravating circumstance was put on the record only at the direction of the trial judge.

REVISED STATUTES OF MISSOURI
1982 SUPPLEMENT

565.012. Evidence to be considered in assessing punishment in capital murder cases.-

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence;

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence;

(3) Any mitigating or aggravating circumstances otherwise authorized by law; and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose

of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The capital murder was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy;

(12) The capital murder was committed by the defendant for the purpose of preventing the person killed from testifying in any judicial proceeding.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

PRE-TRIAL CONFERENCE ON PUNISHMENT PHASE

* * *

THE COURT: That will be overruled. Is that it?

MR. CURRAN: I think we have to discuss the question of the juvenile record if it is admissible and how it is.

THE COURT: Let me give you notes on this. I have heard you fellows talk about this and what have you. Until some strange things have occur[r]ed in the law, unless some strange things occur[r]ed in the law it is always, has been the common law rule that in order to submit a case to the jury or to argue the case to the jury there has to be basis in the record and an evidentiary basis in the record. Now Mr. Bauer says he is not going to have any evidence concerning this defendant's prior criminal activity...

MISS LEISENRING: You are aware and so is Mr. Bauer that I intend to call several witnesses including some people who have known the defendant during the course of his life?

MR. BAUER: I don't know who you are going to call. You gave the list to the investigator. I haven't seen it yet.

MISS LEISENRING: I assume you and your investigator are in communication with one another.

MR. BAUER: No one to my knowledge has been endorsed in the court file. I think they should have been.

MISS LEISENRING: You indicated to me this Monday you had no objection.

MR. BAUER: That is what I am saying now no one is endorsed. I tell you I don't know you are going to call. You may have given the list to my investigator.

MISS LEISENRING: I gave him a list. Included are

two persons, mother and son familiar with the defendant that have known him during the course of his youth, childhood and youth and while I will tell you honestly that I don't think they could give you a recital of his juvenile record I believe they are aware he has been arrested. I don't think they could give you the specifics. He has not been a member of their household as Mr. Bauer has brought on this boy was raised by Janie Tracy. The lady is named Juanita Morgan and is the common law wife to Fred Lashley's father. Her contacts with the defendant has been when he was a tiny baby she kept him 6 months on weekends sometimes. Janie Tracy let the defendant come over and visit. She was aware there have been difficulties he went to Boonville. She can't tell you why exactly. He got into some trouble. That would be the basis for the prosecutor introducing that evidence. That is what I am anticipating he could ask these witnesses. I am not going to ask them about his juvenile record and I am at this time making a motion in limine that the State be prohibited from introducing evidence or eliciting evidence of Fredereick [sic] Lashley's juvenile record through these witnesses, Juanita Morgan, her son, who roughly appears a year or two older than Fred Lashley.

MR. BAUER: My reasons and I think this is what the Court was getting to if I do not present any evidence of any prior criminal history then I don't think I am entitled to introduction of aggravating circumstances on this basis. By the same token if these people testify that the defendant has no prior history then I think the defense would have a basis for an instruction that is the reason for mitigating circumstances. If they are asked that question I have the right to cross examine them, if they were aware of some of the tings [sic] he had done which would involve criminal activity and we would probably end up in the middle somewhere I don't think either one of us are...

MISS LEISENRING: I am not going to ask these witnesses that question which is, are you aware of any type of criminal record the defendant might have.

MR. BAUER: Or criminal activity?

MR. [sic] LEISENRING: I will ask Wardell, what was he like around you, how did you and he relate, what was your behavior and you know what he is going to say things like we played together childhood games whatever.

MR. BAUER: Okay. My response is without it is my contention without any evidence there is no significant criminal history. The defense is not entitled to instruct on mitigating circumstances that he has no criminal history there being no evidence to support it.

THE COURT: Sounds reasonable.

MISS LEISENRING: Perhaps we should cross one bridge at a time. The first bridge being crossed when we present the evidence. After we have presented the evidence then the Judge would be in a position to determine whether or not this is more than one mitigating circumstance which the Court believe [sic] that we could plead in order to get to that stage I am asking for a ruling from the Court at this time based on what I have candidly told the prosecutor I intend my examination of these witnesses to be. I am not hedging anything. I want a ruling in advance that the State be prohibited from introducing evidence from my witnesses concerning the juvenile as to, are you aware he was arrested, went to juvenile home, he stole, robbed, raped or arson.

MR. BAUER: I am willing to do that under the understanding that the rules of evidence if they open the door by asking the reverse questions, does he have any...

MISS LEISENRING: I'm telling you I am not doing that.

MR. BAUER: You want a ruling in advance. I don't think he can do that. I am not intending to ask these people don't mention it to them if you ask them something else opens the door then I'm going to walk in there. I am not intending without the door being open to do that.

THE COURT: You have to go a little bit more into this than just the question of prior criminal activity because an extension of that is in my judgment if you ask these witnesses is Fred a good boy, then I'm going to have some problems...

MISS LEISENRING: I didn't plan to ask that question. Let me look at my questions. You know, I'm not dealing with professional witnesses. These are lay people.

THE COURT: I am saying this. You can't have your cake and eat it too. If you are going to try to prove by these witnesses that this defendant is a good man with prior criminal problems and this is the first problem with the law, when in fact it is not, I have got problems with your proposition.

MISS LEISENRING: The only way I ever imagine it happens is the example you say he is a good boy. If I were to say do you love this child, do you like him, and she were to say he is a good boy that is not what I am trying to get out.

MR. BAUER: I understand that. If you ask them first of all you could tell them you know, if I ask you do you love him and the answer is yes that might eliminate some of the problem if you don't ask questions. I don't want to be unreasonable but if the door is opened I'm going to walk in it.

THE COURT: That is fair.

MR. BAUER: I will tell you if I think the door has been opened. I won't do something like that. Do you love him. Yes. He is a good boy.

MISS LEISENRING: The other question to Wardell is something to the effect, how did he behave when he was around

you.

MR. BAUER: That is fine.

THE COURT: No problem.

MR. BAUER: Unless Wardell mentions some criminal activity they did.

MR. CURRAN: The thrust of her things are of a personal nature. I don't think it will be making any broadbased community statement, but what they felt about him through their relationship with him.

MR. BAUER: I would make a motion in limine that the witnesses not be permitted to testify they don't think he should get the death penalty or in their opinion he shouldn't get the death penalty. That is a form of argument rather than the facts and invades the province of the jury.

THE COURT: Sustained.

MISS LEISENRING: Are you asking this jury to spare his life.

THE COURT: You can do that.

MR. BAUER: You can do that.

MISS LEISENRING: Or, do you want him to live?

MR. BAUER: Sure you can ask that.

THE COURT: Where do we stand at this point?

MR. BAUER: Will you visit him in the penitentiary?

(Discussion is had off the record)

* * *

MISS LEISENRING: Continuing in the discussion that we engaged in earlier today regarding mitigating circumstances we discussed at length the defense position and at the prior record I admitted and indicated to Mr. Bauer the type of questions I would ask from the witness. He knows I am not going to ask them whether or not the defendant had a record. In view of what I anticipate the testimony of both parties will result

in that is a lack of any evidence regarding the defendant's juvenile background or arrest as an adult that we should be allowed to offer that as mitigating circumstances. Specifically there is no significant history of prior criminal activities. He is only 17 which is adulthood in the eyes of criminal justice system.

MR. BAUER: We have gone over this before and my understanding was that the Court ruling unless there is any evidence to submit that instruction it won't be submitted. We have discussed it before.

THE COURT: I have the same feeling.

MISS LEISENRING: We do not have physically in the hands of the court an instructions [sic] that would include no significant history of prior criminal activity as additional mitigating circumstances. I realize in order to preserve the record we must present this to the Court consistent with the court's ruling I expect the court to label that Defendant's Instruction C. Upon the court's receipt and it will be within the next few hours I assume the State has no objection to the fact it is not physically in our hands.

MR. BAUER: No objection.

(Discussion is had off the record)

MR. BAUER: I was going out, for the record, after lunch or now in a second after the instruction conference, due to the fact that the State has voluntarily deleted one of the aggravating circumstances, i.e., torture or depravity of mind, from the aggravating circumstances being submitted to the jury, therefore, the instructions of the Court needed to be altered or changed to conform. One of the changes was that the instruction which is A was a definitional instruction of torture or depravity of mind, has been omitted. The instructions following that instruction have been renumbered and the language has

been changed from the singular to the plural. I will indicate for the record that the Court handed me the instructions of the Court and that Instructions 15, 16, and 17 which will be given prior to evidence being introduced have not been changed and that Instruction 18 has not been changed which is after evidence and before argument. This is the argument of counsel that Ins[t]ruction 19, MAI 15.38; Instruction Number 20 is MAI 15.40 which now has only one aggravating circumstance in the instruction number 21 is now MAI 15.42, Instruction 22 is MAI 15.44 submitted by the defendant, Instruction 23 is MAI 15.46 and Instruction 24, is 15.48 and I think the appropriate verdict forms which we have gone over before.

MR. CURRAN: The other mitigating circumstances I just need.

MR. BAUER: I have reviewed the instructions and I have no objections to them. I think they are correct.

(Discussion off the record)

MR. CURRAN: Your Honor, in light of the argument made by co counsel Miss Leisenring I am submitting to the Court an instruction which I refer to as Defendan'ts [sic] C-1. That is MAI 15.44 modified which is mentioning the mitigating circumstances that the defendant has no significant history of prior criminal activity and Miss Leisenring discussed with the Court and also mentions the reasonable doubt burden.

THE COURT: They are all denied and refused.

MR. CURRAN: I will also submit C-2 which comports with what MAI says it should be and mentions the no significant prior criminal history.

THE COURT: Instruction 16, it is in there. I am going to put it in...

MR. BAUER: 16?

THE COURT: Yes. 16.

THE COURT: I am going to have to make some changes however if she chooses to do so.

MR. CURRAN: The second one.

THE COURT: She may make an opening statement or she may reserve her opening statement.

MR. BAUER: Okay.

(Proceedings leave chambers at 2:10 p.m. Court reconvenes at 2:30 with jury and defendant present)

THE COURT: Ladies and gentlemen, the Court and the attorneys have been engaged in conferences the live long day up until now on matters pertaining to this case. The Court will now read to you some instructions of the law.

(The Court reads Instructions to the jury starting with Instruction No. 15 through 17.)

THE COURT: Ladies and gentlemen of the jury those are the instructions. At this time counsel for the State may proceed.

(Trial Transcript pages 689, 709-716, 725-729)

CLOSING ARGUMENT OF THE STATE

MR. BAUER: Thank you, your Honor. May I have the Court's instructions?

THE COURT: Yes, you may. Just one moment, please.

MR. BAUER: Certainly. I want those that are going to be read.

THE COURT: Would you step up here, please.

(Discussion at the Bench as follows:)

THE COURT: Mention was made to me that another judge on the bench allowed the counsel to argue the instructions to the jury. I am having a problem with it, I don't see it now, oh, there it is, if you read the instructions to the jury they are not the court's instructions.

MR. BAUER: I am going to refer to the instructions to argue the case to the jury obviously...

MISS LEISENRING: I would like to interrupt that that is the defense position also.

THE COURT: I think that we can take care of this by telling the jury these are instructions we anticipate will be given to them.

MISS LEISENRING: No problem.

THE COURT: Very well.

(Discussion leaves the Bench)

THE COURT: Counsel for the State has 20 minutes to argue the case to the jury with a two minute warning. Counsel for the defendant has 20 minutes with a two minute warning. You may proceed.

MR. BAUER: Thank you, your Honor. Ladies and gentlemen as the judge has just told you there will be this time for my final opportunity to talk to you regarding this matter. Miss Leinsenring [sic] is going to have an opportunity to discuss

it with you also. As I told some of you in voir dire these instructions are a little different than the instructions you received in the first part of that trial. At this point you have found the defendant guilty of a premeditated murder. Some of these instructions that I have in my hand the Judge has read to you already. Others he will read to you. I am going to refer to Instructions 20 which he has not read yet. I will anticipate that he will instruct you in determining the punishment against the defendant for the murder of Janie you must first unanimously determine whether the defendant murder [sic] Janie Tracy for the purpose of receiving money or any other thing of value.

Look at the evidence ladies and gentlemen that you recall. You heard in this case yesterday and the day before the defendant on the videotape that you saw here in the courtroom was asked why he broke into the house. For money. For money. They asked him, did you find any money. He saw some pennies in the house. Did you take the pennies? No. I didn't bother with the pennies. And then he waited 20 minutes, the same amount of time I have to talk to you about this. That is how long he waited for one reason. For money. He told you that he knew that Miss Tracy had the money on her. She didn't keep it at home. So, he waited 20 minutes and then he coldbloodedly ambushed here. He fixed that light bulb because he knew exactly what she would do and he was waiting. He lured her in there for one reason, for money.

Let's look at this a little differently. Look at that I think there is no doubt that you can find that he did this for the purpose of receiving money or something of value or something of a monetary value. That makes this case a lot different and a lot more severe and serious than someone who had what could be considered by some somewhat of a legitimate reason. There are times when people get in a fight and get made and get even later

on. That is a little more humane than just killing somebody for $15.00 and to take her car and go for a joy ride. And it wasn't just anybody that he picked on. This was a woman who raised him. This was a woman you just heard Miss Morgan say if it came to a choice between her and the defendant she chose the defendant. This is the woman that for 15 lousy dollars and an opportunity to ride around he murdered. And he waited and he hid in wait and he waited and knocked her down and then he stuck her. That is a lot more coldblooded than for any other reason on earth.

He is no better than Judas. He took the woman who raised him, the woman who put him above herself and murdered her for $15.00. That is not all that is involved in this case.

You heard Mr. Gary said I know him. I have known him at the jail. Ladies and gentlemen Gary didn't know him and raise him for 15 years. It is a very serious question that you have to consider. There are some reasons why the death penalty is the only appropriate punishment in this case.

MR. CURRAN: Your Honor, I object. I believe there is only one aggravating circumstance has been applied. That is a reason not reasons.

THE COURT: Very well. Overruled. Let's proceed.

MISS LEISENRING [sic]: If you don't think that is aggravated enough to kill a woman who raised him from three years old to kill a woman who buy things for him or herself for $15.00, if you don't think that is aggravated, then somebody lost their values along the way. In addition to which the death penalty serves another purpose. You heard the man learned in the criminal justice system talk about deterrents. And what did he tell you? The weight of the authority is that there is no deterrent. There is no absolute. The expert disagreed and I am going to tell you this. When you take a premeditated deliberated

thoughout[sic] murder, that is the type of crime that the death penalty will deter because the type of persons that considers taking somebody's life fully and cooly reflects upon it is the kind of person who can think to himself. He has time to think to himself if I can get the death penalty I may not do this. This is the opportunity. There is no guarantee but there is a chance that somebody may not become an innocent victim for something like that. The death penalty does no good if it stays on the book and it is not applied in appropriate cases. Nobody can guarantee you that the death penalty will accomplish the saving of one life but it is an example worth taking because you are talking about saving innocent lives like Miss Tracy who died a horrible death. I can't bring Miss Tracy back. Nobody can. Some good can come out of the fact that this happened when we look at it now we can't change it. Maybe some good can come out of it. Maybe just one person will change his mind under the fear and the threat that it may be that he would forfeit his life by taking another life. It is not a guarantee.

If we lose what have we done? We have taken a man by his actions has forfeited his right to live. We have taken a coldblooded murderer and put him to death after he forfeited his life on April 9, 1981. If it works we may save an innocent life like Miss Tracy. If it doesn't then he forfeited his life on April 9th anyway.

Ladies and gentlemen he is 17 years old as he sits here calm and cooly like I told you in terms of viciousness you don't get any older. What that man did is as apprehensible as anything you can think of. To take a woman 55 years old who has a soft spot in her head that he knows about because she raised him for 15 years. For $15.00 he takes her life and snuffs it out. If he asked her for the $15.00 she would have given it to him but he didn't want that. He wanted to take it. He wanted to be a big

man. There is only one punishment that is appropriate and fits this crime. And that is the death penalty.

Miss Leisenring is going to have an opportunity to talk to you. She make talk to you about the horrors of the gas chamber. I don't know. If she does I want you to remember this. I want you to think of Miss Tracy when she walked in that house in the dark, dragging a leg, when she went to turn the light on, when she got hit over the head with this. I want you to think of the pain she felt when she screamed and went down on the ground and she looked up and saw the man that she would have given anything he wanted with a knife and she fought for her life when she grabbed that knife, think of that and she fought for her life against this life. That is how she got cut and he knew where she was vunerable [sic] and he stabbed her in the right side. It didn't work. He had the wrong side so he went to the other side. He knew her. He planned it. He killed the woman that raised him. He may sit here and finally cry. I hope he does look at what he did and how he acted afterward. He is crying for himself. He doesn't even care about Janie Tracy. What he did this is the only punishment for that that fits this crime. That is the death penalty.

Something you may consider, certainly you can consider the fact it has been proven beyond a reasonable doubt that he did this for money for himself. Himself. Himself. Himself. All he thought about. And he didn't give a damn about her, the woman that raised him. The woman who'd have died for him and did die for him for $15.00 that he wanted. That is the kind of person you are dealing with. I want you to think of that. Think of what's going through Miss Tracy's mind as she looked up off the floor and she saw a knife in the hand of a man that she raised and seh [sic] loved as he killed her. After he planned it and he waited and he set it up.

There is only one appropriate punishment in this case. I want you to look into your hearts and your minds. This is probably the most difficult thing you will have to do, most of you if not all of you, in your lifetime. I don't want you to make a mistake. Review everything you have heard and you tell me is that worth saving or is that maybe someone else's life can be spared. Maybe there is a chance. Well, I will tell you that chance should be taken. And he should be sentenced to death. Maybe something good can come out of this. If you don't, no good is going to come out of this.

Miss Leisenring is here for one reason. She specializes, she is here for one part of this trial.

MISS LEISENRING: We both are criminal attorneys. I am not a specialist.

THE COURT: All right. Sustained.

MR. BAUER: She is handling only one part of this trial. All of her preparation goes into this part of the trial. Listen to what she has to say. Tell me honestly in your minds with your verdict if what she has to say can possibly outweigh what he did Apirl [sic] 9th when he ended the life of Miss Tracy, a woman who would have done anything for him. Anything. His own witness told you she put herself over him or him over herself before herself. She came second. He came first and he killed her for $15.00 and the opportunity to ride around and buy a drink for a friend.

If that is not worth the death penalty then something is wrong here.

Thank you.

CLOSING ARGUMENT OF DEFENSE ON PUNISHMENT

MISS LEISENRING: Ladies and gentlemen. It is now my opportunity to address you in that final stage of the trial.

Last night I watched each and every one of you as you returned the verdict in this case and I know how difficult it was for each of you to return a verdict. You considered the matter before you made your decision. I don't envy you the task that lies ahead of you for literally you hold a life in your hand. You will probably never again be in this position. You must decide now within a little while whether this 17 year old boy lives or dies.

During jury selection of you you indicated that you could consider the death penalty. Those people, and there were quite a few among yourselves, said they were opposed to the death penalty under any circumstances, have been eliminated but you, saying that you were able to consider the death penalty and imposing it, are two very very different matters.

Let us first turn to the question of execution in general. What are the reasons for executing people? The first, the most commonly used and obviously relied upon by Mr. Bauer is the deterrent effect. We have presented evidence to the contrary. Mr. Gilsinan, a professor from St. Louis University and instructor at St. Louis University and the police academy came here a former Denver police officer, and testified in front of you and he listed or has told you that the weight of the professional opinion is that capital punishment is not a deterrent to premeditated deliberated crime. You have to return a verdict to that crime. Whatever Mr. Bauer has said to you about murder first degree and manslaughter does not apply here. You have to return a verdict of capital murder. And that is precisely what

Mr. Gilsinan addressed his argument to. He had told you that the death penalty, the weight of professional opinion is that the death penalty does not deter capital murder. As a matter of fact he has told you that it probably has the opposite effect. Oddly enough, strange as it may seem, there is a stimulation effect that people that commit crimes because they identify the executions not with those person who are executed.

The second reason that Officer Gilsinan gave for the death penalty is revenge. The phrase that you heard from some of your number, those who are no longer here an eye for an eye and a tooth for a tooth. Ladies and gentlemen I submit to you that in this type of thinking is what ruled in the most primitive types of societies. Surely we have evolved and progressed beyond that type of philosophy. Mercy and compassion are qualities that raise us above our animal life forbearers [sic]. Mercy and compassion are qualities, marks of a civilized society. I would hope that you all consider yourselves to be members of a society that is civilized and continually struggling to become more civilized. Nearly two thousand years ago a man walked the shores of Galilee with his message and he said instead of revenge let us have love. Instead of revenge let us have mercy. Now perhaps for some the idea of an eye for an eye and a life for a life is a gut reaction. But ladies and gentlemen I submit to you it is one of the most base primitive of reactions. Surely you as jurors with the responsibility that you have now can and should rise above those feelings. Rise to a higher plain of feelings to mercy and compassion.

A third argument that often is given is that the death penalty protects socity [sic] . Ladies and gentlemen I submit to you there are alternatives. In primitive times such measure were necessary because there were no alternative. We can look [sic] this boy up. You can lock him up for the rest of his life for the

next 50 years of his life. He will be 67 years old when he is released. It will be the year two thousand thirty two. Many of us will not be here. We can protect ourselves from harm without killing him. This not a war ladies and gentlemen where there are no alternatives. Where the soldier we confronted with his foe must attack and kill or be killed. We have alternatives. The alternatives here in this case are 50 years without the possibility, any possibility of probation and parole.

Ladies and gentlemen the fourth reason is punishment. I submit to you that 50 years without the possibility of probation and parole is an alternative and a terrible punishment. Now consider the facts in this case and ladies and gentlemen Mr. Bauer simply, not simply, but to a large extent got up and reargued the facts in this case. You have already made your decision. You have alread [sic] rendered a verdict form the facts in this case. You decided it was capital murder. Now, you must decide whether or not this is aggravating circumstances and that is what you must look to. It is alleged that the murder of Janie Tracy was committed for money for the purpose of receiving money. How does that distinguish this case form a burglary a robbery or a fraud. Does that distinguish this case to the extent that it warrents [sic] capital punishment? Now, Mr. Bauer has argued that this crime was committed for $15.00. Ladies and gentlemen I ask you would it make any more sense if it had been committed for one hundred thousand dollars? Do we put a value on people's lives? Would it have made more sense? That is really the other side of what he is arguing or tried to argue that it didn't make sense because it was only $15.00. Would it have made sense if it were one hundred thousand dollars?

Now ladies and gentlemen there is no doubt that Janie Tracy suffered. Surely anyone who endures injury suffers. Even for an instance or a second. Even for the shortest period

of time. I am not here to say that she didn't suffer. Remember, even if you do find the existence of aggravating circumstances in this case that does not mean that you have to return the death penalty. If there is any one among your number, one person, one person, who feels that the death penalty is unwarranted, then it should not be given in this case. Then Frederick Lashley will be spared. One person. I would like to turn now to the question of mitigation. Many of you expressed strong reservations you hesitated long before you said you thought you could consider the death penalty in the case where the accused was 17 years old. And your feelings are very much in line with the Missouri State Legislature. They have outlined that the age of the defendant is one of the factors that may be taken into consideration. Fred Lashley is an adult in the eyes of the criminal justice system. He is responsible for his actions and his behavior. I am not saying otherwise. But, ladies and gentlemen, he is just at the threshhold of his adult life. He bears many of the wages of childhood. He can't vote. Adults are legally responsible for his shelter, his food and his clothing. Ladies and gentlemen Fredy [sic] Lashley is till [sic] a boy. And you may take this into consideration and you should take it into consideration.

Ladies and gentlemen, even humans never outgrow the capacity to change surely the greatest potential for change lies with young adults. It is difficult to argue that a 17 year old boy is so fixed in his values, his habits and his behavior that he can't change. Ladies and gentlemen, I beg of you, give Frederick Lashley a chance for rehabilitation. This is a sacred life that we all hold dear to ourselves that no one is beyond redemption and surely a 17 year old boy is not beyond redemption. Fred Lashley can be rehabilitated. He can make a contribution to society the prison and the outside world from in the walls of the

penitentiary. An example that comes to mind are the braille books that are prepared by the inmates at the Missouri State Penitentiary that are used by students at the School of the Blind. He can serve a useful role.

Ladies and gentlemen, consider the effect with the death penalty executions caused by the death penalty on society and you, as jurors, if it was wrong for Fred Lashley to kill Janie Tracy, then it is wrong for you to kill Fred Lashley.

MR. BAUER: Object, your Honor.

THE COURT: It is within the scope of discussion on the closing argument. Overruled.

MISS LEISENRING: Ladies and gentlemen I submit to you that is inconsistent position. An example that comes to mind is something we are schooled in and taught as children, concerning Cane and Able. Did God impose the death penalty on Cane when he sleu [sic] Able? No. He banned him and punished him. And, you ladies and gentlement [sic] should follow God's example. What interest would be serve [sic] by killing Fred Lashly [sic]? Janie Tracy is dead. Killing Fred Lashley cannot bring her back. Her memory cannot be served and is not honored by killing Fred Lashley. That is what revenge is all about. Would you ask yourself would she have wanted the death penalty? What kind of person was she? By all accounts she was a loving person. She would have wanted you to show mercy and compassion for Frederick Lashley.

Finally, make a simple plea for mercy. You have seen me talking to Fred Lashley throughout this trial. In the past year I have gotten to know and like Fred Lashley.

Mr. Bauer calls me a specialist. I am a public defender. I am one of many public defenders. I have an average of 80 cases I work on at one time. I have seen countless men and women in the four years that I have been a public defender.

And, I have noticed a difference in Fred Lashley. I have seen signs of maturity and change.

Ladies and gentlemen I beg of you, have mercy. Show compassion.

Thank you.

(Trial Transcript pages 755-771)

MISSOURI APPROVED INSTRUCTION-CRIMINAL -- SECOND EDITION

15.44 Guilty of Capital Murder: Submission of Mitigating Circumstances

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. _, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of [name of victim].

(You may also consider [here insert and, if more than one, list and number in separate paragraphs any one or more of the following "statutory mitigating circumstances" which are supported by evidence. Omit this entire paragraph if there are no such circumstances to submit.]

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the murder of [name of victim] was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. Whether [name of victim] was a participant in the defendant's conduct or consented to the act.

4. Whether the defendant was an accomplice in the murder of [name of victim] and whether his participation was relatively minor.

5. Whether the defendant acted under extreme duress or substantial domination of another person.

6. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. The age of the defendant at the time of the offense.)

(You may also consider [See Note 4])

(You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment. [See Note 5])

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Notes on Use

1. This instruction will be read to the jury immediately after MAI-CR 15.42.

2. The blank in the first paragraph will be filled in with the number given MAI-CR 15.42.

3. The second paragraph must be given, whether requested or not, if there is evidence supporting any "statu-

tory'' mitigating circumstance. See Sections 565.012.1(2) and 565.012.3.

4. The third paragraph must be given, whether requested or not, if there is evidence supporting a mitigating circumstance or circumstances ''authorized by law''. See Section 565.012.1(3). If more than one such circumstance is submitted, each one should be numbered, begin with the word ''That'', and set off in a separate paragraph not connected with an ''and'' or an ''or''.

Omit all of the third paragraph if there are no such circumstances to submit.

The phrase ''authorized by law'' does not limit extenuating or mitigating circumstances to those specifically directed to death penalty issues. Section 556.006.2 provides, in part, that ''the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas''.

Note also that RSMo 1969, Section 552.030.3(2) provides that ''evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible. . .for the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment.'' Therefore, in directing the jury to consider extenuating or mitigating circumstances ''otherwise authorized by law'', the court should permit the jury to consider any evidence that the defendant suffered from a ''mental disease or defect'' as that phrase is defined in Section 552.010, RSMo 1969, and in MAI-CR 2.32. In such case one of the mitigating circumstances might be: ''That the defendant had a mental

disease or defect at the time of the murder of [name of victim]''. The court must then follow that with the MAI-CR 2.32 definition of ''mental disease or defect'' even if that definition was also given at the first stage of the trial.

5. The jury may consider extenuating or mitigating circumstances even though not set out as ''statutory'' mitigating circumstances in Section 565.012.3 and even though not ''authorized by law'' within the meaning of that phrase discussed in 4 above. However, no instruction should be given calling the jury's attention to any particular circumstance referred to in general in this paragraph.

15.46 Guilty of Capital Murder: Final Decision on the Punishment

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

Note on Use

This instruction should be read to the jury immediately following MAI-CR 15.44 or after a definition of "mental disease or defect" if such a definition was given in connection with MAI-CR 15.44.

Supreme Court, U.S.
FILED
NOV 16 1992
OFFICE OF THE CLERK

No. 92-409

In The
Supreme Court of the United States
October Term, 1992

PAUL DELO, SUPERINTENDENT
Potosi Correctional Center,
Petitioner,

v.

FREDERICK LASHLEY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The first question as stated by the Petitioner does not fully reflect all of the facts. Properly stated, they are:

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE A STATE TRIAL COURT TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT WAS PREVENTED BY THE TRIAL COURT THROUGH AN ERRONEOUS EVIDENTIARY RULING FROM PRESENTING AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION.

II.

WHETHER A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED A HARMLESS ERROR WHEN REVIEWED IN A FEDERAL HABEAS CORPUS ACTION?

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I.

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No. 92-409

In The
Supreme Court of the United States
October Term, 1992

PAUL DELO, SUPERINTENDENT
Potosi Correctional Center,
Petitioner,

v.

FREDERICK LASHLEY,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Frederick Lashley, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the panel opinion of the United States Court of Appeals for the Eighth Circuit reversing and remanding Respondent's sentence of death.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Eighth Circuit issued its opinion on March 4, 1992. Superintendent Delo's petition for rehearing or rehearing en banc was denied by the Court of Appeals on July 1, 1992. Pursuant to 28 U.S.C., Section 2201(c) and Supreme Court Rule 13.1, the present petition for a writ of certiorari was filed by Petitioner within ninety (90) days.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions set forth in Petitioner's petition, this case also involves the following Missouri statute:

> Court orders not to affect civil rights - not evidence, exception
>
> 1. No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.
> 2. No child shall be charged with a crime or convicted unless the case is transferred to a court of general jurisdiction as provided in this chapter.
> 3. After a child is taken into custody as provided in section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under the chapter.
> 4. The disposition made of a child and the evidence given in the court does not operate to disqualify the child in any future civil or military service application or appointment.
>
> Missouri Revised Statute, Section 211.271

STATEMENT OF THE CASE

Respondent, Frederick Lashley, was convicted of capital murder, Section 565.001, Missouri Revised Statute (1978)(Repealed October 1, 1984), for which he was sentenced to death by the Circuit Court of the City of St. Louis, Missouri. The circumstances surrounding Respondent's crime were summarized by the

Missouri Supreme Court on direct appeal.

Defendant, Frederick Lashley, 17, was convicted of the capital murder of his physically handicapped 55-year-old cousin and foster mother, Janie Tracy, while robbing her of $15. The punishment prescribed by the jury and approved by the trial court is death. We affirm.

The victim lived alone in a downstairs apartment in the City of St. Louis, She had heart rouble, diabetes and a neuromuscular problem that caused her to limp and required her to use a walking cane. She had difficulty walking since she had undergone a brain operation a number of years ago. The operation had resulted in the removal of a portion of her skull on the left side of her head. Defendant had lived with and been cared for by Miss Tracy (and her mother) from the time he was two years of age until he was sixteen years old. He had been present on occasions when there had been discussions concerning the soft spot on Miss Tracy's head.

On the night of April 9, 1981, Miss Tracy was visiting her sister, Mrs. Williams, who lived several blocks from the Tracy apartment. Sometime before 8:30 p.m., Defendant entered the apartment by climbing through the top of a window on the rear porch. He unscrewed the light bulb in the front room so that the light would not come on when the switch was turned on. His admitted purpose was to ambush Miss Tracy and take her money when

she returned home. Defendant, armed with a cast iron skillet (and the jury could reasonably find he also had a butcher knife having a seven and one-half inch blade), waited in the dark in the bedroom adjacent to the front room.

Miss Tracy left her sister's home between 8:00 and 8:30 p.m., driving her car. In his confessions to the police, one of which was videotaped, Defendant stated that when Miss Tracy entered the front door of the apartment, she attempted to turn on the light. When the light did not come on she started into the room where Defendant was waiting. As she reached for the light switch he struck her in the head with the iron skillet, breaking it into two pieces. He said she fell and began screaming and he put his hand over her mouth. When asked where the knife came from the Defendant stated:

> Off the floor. It was on-well, really it was on the floor. That's-I mean, you know, I just see the knife and then I grabbed it, you know. And then she had it in her hand. We both had it. And then I finally got it-got it back and then that's when I struck her with it.

Defendant took $15 and car keys from Miss Tracy's purse, locked the front door on the way out of the apartment, and drove off in the victim's automobile. He was apprehended while driving the stolen vehicle shortly

after midnight.

An upstairs neighbor of Miss Tracy, Mrs. Ali, 81, had heard screams followed by something which sounded "like a fall" from the downstairs apartment. She telephoned the Tracy apartment and when she did not get an answer, called Mrs. Williams to come over and investigate. Mrs. Williams and her husband went to her sister's apartment shortly after 8:30 p.m. Mrs. Williams noticed her sister's car was not parked outside. She had a key to the apartment and upon entering it, saw her sister on the floor of the bedroom, bleeding about the head. She also saw a butcher knife near Miss Tracy and a broken skillet on the bedroom floor. Police and medical assistance were immediately summoned.

Hospital records showed Miss Tracy was comatose and brain dead when she arrived at the hospital. She had a cut on her head above the right ear, "defense" knife cuts on her fingers, and a one-inch incision above her left ear where the knife entered her skull through the soft spot and penetrated her brain. This stab would cause her death approximately 48 hours later.

Defendant did not testify at trial but his written and videotaped confessions were introduced by the State. In both, he admitted striking the defenseless woman with the skillet with sufficient force to knock her down and then plunged the butcher knife into her head.

State v. Lashley, 667 S.W.2d 712, 713-715 (Mo.banc)(footnote omitted), cert. denied, 469 U.S.873 (1983). On the basis of the evidence introduced at trial, the jury found Respondent guilty of capital murder.

During the conference preceding the penalty phase, attorney for the Defendant made a motion in limine to prevent the state from introducing any evidence of Lashley's juvenile record. After a conference between both attorneys and the court, it was determined that in the event the Defendant entered any evidence of a criminal record, the court would allow the state to introduce the juvenile record of the Defendant. As a result of this position by the court, there was no evidence introduced that the Defendant had no significant history of prior criminal activity. The mitigating circumstances' instruction requested by the Defendant was denied by the court (App.A-82 - A-89). The jury found that a statutory aggravating circumstance did, in fact, exist and they assessed capital punishment as the Respondent's penalty. The Missouri Court upheld the conviction and sentence on direct appeal. Lashley v. State, 721 S.W.2d 31 Mo.App.,E.D.1986, cert. denied.

Respondent, Lashley, then sought post conviction relief pursuant to former Missouri Court Rule 27.26 (Repealed effective 1988) and this motion was denied by the Circuit Court of the City of St. Louis, Missouri. The appeal to the Missouri Court of Appeals was denied, Lashley v. State, 721 S.W.2d 31 Mo.App.,E.D.1986, cert.denied.

Lashley then filed a petition for a writ of habeas corpus on

May 14, 1987, in the United States District Court for the Eastern District of Missouri (App. A-64 - A-77). Judge Edward Filippine denied each allegation contained in Respondent's petition (App. A-24, A-25 - A-27, A-28 - A-29, A-30 - A-31). The District Court granted a certificate of probable cause for appeal.

On appeal, the United States Court of Appeals for the Eighth Circuit found the Respondent was denied protection of the Eighth Amendment as a result of the Missouri trial court's refusal to give a mitigating circumstance instruction that had been requested. Lashley v. Armontrout, 957 F.2d 1495,1501-1502(8th Cir.1992)(App. A-1 - A-21)

Petitioner's petition for rehearing or rehearing en banc was denied by the Court of Appeals on July 1, 1992. (App. A-22). The present petition for writ of certiorari is now before this Honorable Court.

ARGUMENT

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE A STATE TRIAL COURT TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT WAS PREVENTED BY THE TRIAL COURT THROUGH AN ERRONEOUS EVIDENTIARY RULING FROM PRESENTING AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION.

Respondent, Lashley, was convicted of capital murder in the City of St. Louis. All state appellant processes were exhausted by the Defendant and a Federal habeas corpus action was filed in

the United States District Court. Respondent's writ of habeas corpus was denied in the United District Court but on appeal to the United States Court of Appeals for the Eighth District, a three-judge panel overturned the sentence on the basis of an Eighth Amendment violation which occurred during the penalty phase of the trial proceeding.

The Court of Appeals determined that it was constitutional error for the Missouri trial court to refuse Respondent's requested instruction which would have informed the jury that they consider as a mitigating factor the fact that Defendant had "no significant history of prior criminal activity". Missouri Revised Statutes, Section 565.032.3(1)(Supp.1990). The Trial Court overruled Respondent's motion in limine to prevent the State of Missouri from introducing any evidence of Respondent's juvenile record if Respondent attempted to introduce evidence of his lack of significant history of prior criminal activity. As a result of this ruling, the Respondent was prohibited from introducing evidence which would have supported the giving of the instruction which would have informed the jury that they consider the fact that Defendant had "no significant history of prior criminal activity". The Court of Appeals found that the actions of the trial judge violated Respondent's Eighth Amendment right as set out in Lockett v. Ohio, 438 U.S.586, 604(1978), and that the court, in fact, should have submitted the requested instruction to the jury for their consideration. Lashley v. Armontrout, 957 Fed.2d 1495, 1501(Eighth Cir.1992). The decision of the Eighth Circuit Court

of Appeals is completely consistent with this court's Eighth Amendment jurisprudence and Missouri Law which governs procedures applied in capital cases. In this particular case the trial attorney filed a motion in limine to prevent the state from introducing any evidence of Lashley's juvenile record. The trial court's overruling of this motion is clearly contrary to state law which provides:

> 1. No adjudication by the juvenile court on the status of a child should be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.
>
> . . .
>
> 3. After a child is taken into custody as provided in Section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and the juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceedings, civil or criminal, other than proceedings under this chapter. Missouri Revised Statutes, Section 211.271(1978)(Emphasis supplied).

It is clear from the review of the transcript of the pre-trial conference (App.A-82 - A-89) that if the trial attorney had introduced evidence that Lashley had no prior significant criminal activity, that the trial judge would have erroneously allowed the state to introduce evidence of juvenile offenses. It is also clear that the writer of the opinion submitted by the Eighth Circuit Court of Appeals came to the same conclusion and stated so in the footnote contained in the opinion. (App. A-9 - A-10)

The majority opinion also noted that it was unlikely that the prosecution could have supported a finding of "significant history

of prior criminal conduct" due to the fact that Lashley was seventeen years of age at the time the offense was committed. This opinion is supported by, and consistent with, the landmark case of Lockett v. Ohio, 438 U.S.586 at 604, which states:

> The Eighth and Fourteenth Amendments require that the sentencer in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. This strong position is based on the belief that when dealing in capital cases each individual is entitled to have every aspect of their being considered by the sentencer in order to insure that the ultimate punishment is properly administered.

As the Supreme Court made clear in Woodson v. North Carolina, 428 U.S.280,96 S.Ct.2978,49 L.Ed.2d 944(1976), "in capital cases the fundamental respect for humanity, the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". Id. at 304 96 S.Ct. at 2991 (Opinion of Stewart, Powell and Stevens, JJ.). It is well accepted that the court views capital cases differently than non-capital cases since the imposition of death is so different from any other penalty which can be imposed by the court. The court goes to great lengths to insure that the sentencer has available for consideration any aspect of the accused which may reflect on the character and propensities of the offender before pronouncing sentencing. Lockett v. Ohio, 438 U.S.586(1978). Judge Fagg stated in his dissenting opinion that there is no dispute when there is

evidence before the court of a mitigating circumstance that the defendant is entitled to an instruction on that evidence. Judge Fagg believed in this case that the court misapplied Lockett for the reason that the trial court had no evidence to support the instruction of mitigating circumstance of "no significant history of prior criminal activity". Lashley, 957 Fed.2d at 1503(Fagg J. dissenting). As was noted in the majority opinion, the sole reason that there was no evidence presented by the Defendant concerning his lack of significant history of prior criminal activity was due to the erroneous position of the trial judge who indicated that he would allow the juvenile record of the Defendant to be presented to the jury in the event there was any attempt by the Defendant to introduce a lack of criminal history. The admission of this evidence for any reason is obviously in direct conflict with Missouri Statutes, Revised Statutes of Missouri, Section 211.271(1978). The effect of the trial court's position was to preclude the sentencer from considering a mitigating factor before imposing final sentence. In Eddings v. Oklahoma, 455 U.S.104,102 S.Ct.869,79 L.Ed.2d1 1982, the court held, "the majority of the court reaffirmed that a sentencer may not be precluded from considering or may not refuse to consider any relevant mitigating evidence offered by the defendant as a basis for a sentence less than death". In the case of Mills v. Maryland, 108 S.Ct.1860(1988), the court drew added emphasis to its opinion in Eddings when it stated that this position was beyond dispute in a capital case. The court further stated in Mills v. Maryland, Id

at 1866, "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating circumstances interposed by statute, Lockett v. Ohio, Supra. Hitchcock v. Dugger, 481 U.S.391(1987). 107 S.Ct.1821, 95 Lawyer's Ed.2d 347(1987); by the sentencing court, Eddings v. Oklahoma, Supra.; or by an evidentiary ruling, Skipper v. South Carolina, 476 U.S.2(1986) . . .; because the (sentencers) failure to consider all the mitigating evidence risks erroneous imposition of the death sentence in plain violation of Lockett, . . .". The court specifically held in Skipper v. South Carolina, 106 S.Ct. 1669, 1673(1986) "that the exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender".

In this particular case, the court reversed the sentencing of the Defendant for the reason that the trial judge made an erroneous evidentiary ruling which prevented the sentencer from considering the mitigating evidence. It is the contention of the Respondent that this is exactly what occurred to Frederick Lashley in the case at bar. The sole reason that the evidence Judge Fagg was searching for to support the mitigating circumstance instruction as submitted by trial counsel was not in evidence was due to the court's clear misapplication of Missouri Law.

The sentencer's consideration of the mitigating factor of Defendant's lack of significant history of prior criminal activity is crucial in order to assure that the death penalty is properly

administered. The court has gone so far as to hold that not only may the state not preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant, mitigating evidence. Penry v. Lynaugh, 109 S.Ct.2934(1989), the court further stated that:

> "A state could not, consistent with the Eighth and Fourteenth Amendment, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances the offense that mitigates against imposing the death penalty." Id. at 2946.

The court further stated:

> "Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must be able to give effect to that evidence in imposing sentence. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct.1821, 95 Lawyer's Ed.2d 347(1987). Only then can we be sure that a sentencer has treated the defendant as a "uniquely individual human being" and has made a reliable determination that it is the appropriate sentence." Id. at 2947.

It is the contention of the Respondent and the belief of the Eighth Circuit Court of Appeals that a trial judge through an erroneous interpretation of the law not be permitted to do what the state itself is specifically prohibited from doing. It is clear from the transcript that had the trial judge followed Missouri Statutes and ruled accordingly, evidence would have been introduced which would have shown that Lashley had "no significant history of prior criminal activity" and as a result, the mitigating circumstance instruction would have been submitted to the jury for their consideration and all of the standards set forth in Lockett would have been met.

We are in a unique position here in that there is evidence contained in the transcript (App. A-82 - A-89) which clearly shows efforts by the Defendant to introduce evidence which would have unquestionably supported an instruction of "no significant history of prior criminal activity".

The decision as handed down by the Eighth Circuit Court of Appeals is clearly not within the standards as set forth in Rule 10.1(a)(b)(c) of the Rules of the Supreme Court for the granting of a writ of certiorari. Looking at all aspects of this case, taking into consideration the entire transcript and the law applicable as the Eighth Circuit Court of Appeals has done, it is clear that the result reached by the Eighth Circuit Court of Appeals is consistent with all other opinions cited by Petitioner and is in no way a departure from the accepted and normal course of judicial proceedings.

II.

WHETHER A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED A HARMLESS ERROR WHEN REVIEWED IN A FEDERAL HABEAS CORPUS ACTION?

Petitioner has stated in their petition that even if the state trial court committed a constitutional violation by refusing to give the mitigating circumstance instruction concerning Respondent, Lashley's, lack of significant history of prior criminal conduct, that it is harmless error. The thrust of Petitioner's argument is that there was no need for a specific instruction on the mitigating circumstance of "no significant history of prior criminal activity", that the jury was obviously aware that there was no

evidence of a significant prior criminal misconduct and, therefore, it can be presumed they gave due consideration to this fact. The Court has specifically rejected this contention in Penry and have repeatedly held that in order to insure a jury's consideration of any mitigating circumstance, there must be a specific instruction. Absent such instruction, the court can never be sure that a jury fully considered the effect of that particular mitigating circumstance. The only conceivable, positive fact that Lashley had going for him was his lack of prior significant criminal activity. It is inconceivable for Respondent to understand how the Petitioner can argue at this point that the instruction, or lack thereof, is unimportant and insignificant when their trial attorney fought so desperately hard to prevent the giving of it during the penalty phase. There is no logic to the position that the failure to give a mitigating circumstance instruction during the penalty phase would be harmless and insignificant. This particular instruction is absolutely critical. The most fundamental element of all cases pertaining to the death penalty is whether or not defendant received a fair and impartial trial from a fully informed jury. To deny a jury this particular instruction and then argue that it is harmless error is to, in effect, say all instructions are insignificant. It is impossible for the State of Missouri or this Honorable Court to do anything more than speculate as to reasoning and thinking behind the jury's decision. In a case involving the ultimate penalty, this is not enough. We must be certain that the jury at least considers certain basic fundamental points in order

to guarantee a defendant every constitutional right to which he is entitled. The court has held that the strict standard of "beyond a reasonable doubt" shall be used in determining if proposed mitigating evidence regarding a defendant's character would not have influenced a jury in Hitchcock v. Dugger, 481 U.S.391(1987). Only the twelve jurors who sat in judgement on Frederick Lashley can state beyond a reasonable doubt whether or not they would have been influenced by the admission of this evidence. This is consistent with what the Eighth Circuit Court of Appeals has recommended when they determined that this matter should be sent back for resentencing. As a result, this Honorable Court should allow the Eighth Circuit Court of Appeals' ruling to stand and let a jury who sat in judgement of Mr. Lashley determine his fate.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

PAUL DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, PETITIONER
v. FREDERICK LASHLEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92–409. Decided March 8, 1993

PER CURIAM.*

I

Respondent Frederick Lashley brutally beat and stabbed to death his 55-year-old, physically impaired cousin and foster mother, Janie Tracy, in the course of robbing her. An adult in the eyes of Missouri law at age 17, Lashley was convicted of capital murder, Mo. Rev. Stat. §565.001 (1978) (repealed Oct. 1, 1984), and sentenced to death. At a conference preceding the penalty phase of the trial, one of Lashley's attorneys asked the judge to instruct the jury on the mitigating circumstance that "[t]he defendant ha[d] no significant history of prior criminal activity," Mo. Rev. Stat. §565.012.3(1) (1978) (current version Mo. Rev. Stat. §565.032.3(1) (Supp. 1991)). App. to Pet. for Cert. A–86 to A–87. Defense counsel sought this instruction even though she repeatedly asserted that she would not try to show that Lashley lacked a criminal past. *Id.*, at A–84, A–86. At the same time, she moved for an order prohibiting the State from cross-examining defense witnesses as to Lashley's juvenile record. *Id.*, at A–83, A–84. Such questioning may not have been permissible under Missouri law. See Mo. Rev. Stat. §211.271 (1986). In any

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*JUSTICE SOUTER joins only Part I of this opinion.

event, the judge did not expressly rule on the latter motion. See *Lashley* v. *Armontrout*, 957 F. 2d 1495, 1501, n. 1 (1992) ("[T]he trial court was not called upon to rule in respect to the admissibility of defendant's juvenile record"). The judge did indicate, however, that Lashley would not be entitled to the requested instruction without supporting evidence. App. to Pet. for Cert. A–84, A–87.

Perhaps Lashley's attorneys chose not to make the necessary proffer because they feared that the prosecutor would be permitted to respond with evidence that Lashley had engaged in criminal activity as a juvenile. One of the attorneys so testified in a state collateral proceeding. Tr. 29 (Apr. 10, 1985). Or perhaps defense counsel sought to avoid opening the door to evidence that Lashley had committed other crimes as an adult. As the Missouri Supreme Court observed, the record indicates that, following his arrest, Lashley confessed to committing several other crimes after attaining adult status.† *State* v. *Lashley*, 667 S. W. 2d 712, 716 (Mo.), cert. denied, 469 U. S. 873 (1984); see also 677 S. W. 2d, at 717 (Blackmar, J., concurring in part and dissenting in part).

Whatever their reasons, Lashley's lawyers presented no proof that he lacked a significant criminal history. Nor did the prosecutor submit any evidence that would support

†At the guilt phase of the trial, defense counsel moved to exclude "some confessions regarding 7 other crimes," including burglary, robbery and stealing. Tr. 425 (Jan. 27, 1982). The motion was made not on the ground that the crimes were connected to the charged offense, cf. *post*, at 1, or that they were committed while Lashley was a juvenile, but because they were "extremely prejudicial" and "[ir]relevant" to Lashley's guilt or innocence of the murder. Motion *in Limine*, Record 143 (Jan. 21, 1982). In a pre-trial conference, defense counsel specifically stated that at least one of the crimes had been committed "a week or two" before the murder—that is, when Lashley was already an adult. Tr. 425 (Jan. 27, 1982). The presentence report contains additional evidence. Under the heading "Adult Arrest Record," the report indicates that Lashley was arrested for three offenses (robbery, burglary, and stealing) the day after his arrest for the present crime. Missouri Dept. of Social Services, Div. of Probation and Parole 2 (March 23, 1982).

the mitigating circumstance. The trial judge refused to give the jury the "no significant history of prior criminal activity" instruction. The Missouri Supreme Court affirmed. It reasoned that Missouri law requires mitigating circumstance instructions to be supported by some evidence, see, *e.g.*, *State* v. *Battle*, 661 S. W. 2d 487, 492 (Mo. 1983), cert. denied, 466 U. S. 993 (1984); see also *State* v. *Williams*, 652 S. W. 2d 102, 114 (Mo. 1983), and none was offered here. *State* v. *Lashley*, *supra*, at 715–716.

Lashley filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. He alleged that the trial judge's failure to give the requested instruction violated due process. The District Court dismissed the claim. *Lashley* v. *Armontrout*, No. 87–897C(2) (ED Mo., June 9, 1988). A divided panel of the Court of Appeals for the Eighth Circuit, however, granted relief. *Lashley* v. *Armontrout*, 957 F. 2d 1495 (1992). The Court of Appeals thought that the trial judge's ruling violated the Eighth Amendment under *Lockett* v. *Ohio*, 438 U. S. 586 (1978). In the majority's view, "*Lockett* requires the State—which is in a peculiarly advantageous position to show a significant prior criminal history, if indeed Lashley has such a history—to come forward with evidence, or else the court must tell the jury it may consider the requested mitigating circumstance." 957 F. 2d, at 1502. The court held that "the lack of any evidence whatever of Lashley's prior criminal activity entitled [him] to the requested instruction." *Ibid.*

As Judge Fagg explained in dissent, see *id.*, at 1502–1504, the majority plainly misread our precedents. We have held that the sentencer must be allowed to consider in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death." *Lockett*, *supra*, at 604 (plurality opinion) (emphasis added). Accord, *Penry* v. *Lynaugh*, 492 U. S. 302, 317 (1989); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110

(1982); see also *Penry*, *supra*, at 327 ("[S]o long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence *introduced by a defendant*" (emphasis added)). But we never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence.

On the contrary, we have said that to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants. See *Hopper* v. *Evans*, 456 U. S. 605, 611 (1982). And, answering a question expressly reserved in *Lockett*, we recently made clear that a State may require the defendant "'to bear the risk of nonpersuasion as to the existence of mitigating circumstances.'" *Walton* v. *Arizona*, 497 U. S. 639, 650 (1990) (plurality opinion) (quoting *Lockett*, *supra*, at 609, n. 16); see also 497 U. S., at 669–673 (SCALIA, J., concurring in part and concurring in judgment) (rejecting *Lockett*). In *Walton* we rejected a challenge to a state statute that imposed on capital defendants the burden of establishing the existence of mitigating circumstances by a preponderance of the evidence—a higher evidentiary standard, we note, than Missouri has adopted. Discerning no "constitutional imperative . . . that would require the [sentencer] to consider the mitigating circumstances claimed by a defendant unless the State negated them," 497 U. S., at 650, we concluded that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden . . . to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency," *ibid.*

Even prior to *Walton*, other lower courts rejected arguments similar to Lashley's. For example, in *State* v. *Fullwood*, 323 N. C. 371, 373 S. E. 2d 518 (1988), vacated and remanded on other grounds, 494 U. S. 1022 (1990),

the court held that the trial judge did not err by refusing to submit to the jury a "no significant history of prior criminal activity" instruction where neither the defendant nor the State introduced evidence to support it. 323 N. C., at 394, 373 S. E. 2d, at 532; see also *Hutchins* v. *Garrison*, 724 F. 2d 1425, 1436–1437 (CA4 1983) (where defendant did not request a criminal history mitigating instruction and the record did not support it, any error resulting from failure to give the instruction was an error of state law only), cert. denied, 464 U. S. 1065 (1984). In *DeLuna* v. *Lynaugh*, 890 F. 2d 720 (CA5 1989), the Fifth Circuit held that a capital defendant was not entitled to a mitigating instruction under *Penry* because he had made a "tactical decision" not to introduce supporting evidence that would have "opened the door to the introduction in evidence of a prior criminal record." 890 F. 2d, at 722. Accord, *May* v. *Collins*, 904 F. 2d 228, 232 (CA5 1990), cert. denied, 498 U. S. 1055 (1991).

In short, until the Court of Appeals' decision in this case, it appears that lower courts consistently applied the principles established by *Lockett* and its progeny. Today we make explicit the clear implication of our precedents: Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction.

We are not persuaded by the Court of Appeals' assertion that the State was uniquely situated to prove whether or not Lashley had a significant prior criminal history. As an initial matter, Missouri law does not demand *proof* that a mitigating circumstance exists; it requires only some supporting evidence. Lashley acknowledged in his federal habeas petition that his attorneys could have put forward some evidence that he lacked a significant prior criminal history; indeed, he contended that they were constitutionally ineffective for failing to do so. App. to Pet. for Cert. A–71. There is no reason to suppose, as the

dissent suggests, *post*, at 9, that Lashley would be required to testify in order to receive the mitigating instruction. Before the state trial court, the prosecution submitted that testimony by Lashley's acquaintances would suffice. App. to Pet. for Cert. A–83. On these facts, we cannot say that the State unfairly required Lashley to prove a negative.

Nor are we convinced that, as a general rule, States are better positioned than criminal defendants to adduce evidence of the defendants' own criminal history. While the prosecution may have ready access to records of crimes committed within its own jurisdiction, the same may not be true when the defendant has committed crimes in other jurisdictions, perhaps over a period of many years. And any presentence report that is created is available to both the government and the defense. In this case, Lashley has not suggested that he was unable to offer his presentence report as evidence that his prior criminal record was insignificant. Moreover, the statutory mitigating circumstance refers not to arrests or convictions, but more broadly to "criminal activity." To the extent that this includes criminal conduct that has not resulted in formal charges, no one is better able than the defendant to make the required proffer.

II

The dissent contends that this case is not about the requirements of *Lockett* at all, but about the "presumption of innocence." *Post*, at 2. The question the dissent raises is indeed "novel," *ibid.;* it apparently was not raised in either the District Court or the Court of Appeals, and it was not presented to this Court. Nor does the dissent's argument compel a different result. To be sure, we have said that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976). The presumption operates at the guilt phase of a trial to remind the jury

that the State has the burden of establishing every element of the offense beyond a reasonable doubt. *Taylor* v. *Kentucky*, 436 U. S. 478, 484, n. 12 (1978). But even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense. *Kentucky* v. *Whorton*, 441 U. S. 786, 789 (1979) *(per curiam)*. An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a "'genuine danger'" that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt. *Ibid.* (quoting *Taylor, supra*, at 488).

Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears. See *Herrera* v. *Collins*, 506 U. S. ___, ___ (slip op., at 8) (1993); *id.*, at ___ (slip op., at 15) (Blackmun, J., dissenting). We have not considered previously whether a presumption that the defendant is innocent of other crimes attaches at the sentencing phase. But even assuming that such a presumption does attach, Lashley was not entitled to a "presumption of innocence" instruction. Under our precedents, the instruction would have been constitutionally required only if the circumstances created a genuine risk that the jury would conclude, from factors other than the State's evidence, that the defendant had committed other crimes. See, *e.g.*, *Whorton, supra*, at 788–789. Lashley does not contend that any such circumstances existed in this case. As the dissent acknowledges, *post*, at 2, the record before the jury was completely silent on the question whether Lashley had committed prior offenses. The jury was specifically instructed that the State had the burden of proving the existence of any aggravating circumstances "beyond a reasonable doubt." Instructions Nos. 20–21, Record 77, 79 (Jan. 29, 1982). Nothing disturbed the presumption that Lashley was a first offender.

The "circumstances" on which the dissent relies, *post*, at 5–6, had no bearing on the jurors' perceptions. Lashley's age and the sentence to which he was subject

were irrelevant to the question whether the jury might conclude improperly that he was a repeat offender. The dissent assigns special weight to the fact that defense counsel may have decided not to introduce evidence concerning Lashley's prior criminal history for fear that the State would introduce Lashley's juvenile record. We note that, had the trial court improperly admitted evidence of Lashley's juvenile record, defense counsel could have objected and preserved the issue for appeal. In any event, the only impact that defense counsel's decision not to make the necessary proffer could have had on the *jury* was to deprive it of possible testimony that Lashley lacked a criminal history. Without such testimony, the record before the jury was still silent on the question of Lashley's criminal past. Thus, assuming *arguendo* that a presumption of innocence did attach at Lashley's sentencing, under *Whorton* he was not constitutionally entitled to a "presumption of innocence" instruction.

Lashley's motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

PAUL DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, PETITIONER *v.* FREDERICK LASHLEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92–409. Decided March 8, 1993

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Thirty days after his 17th birthday, respondent entered his cousin's home, murdered her, and stole about $15.00. He was promptly arrested and made a series of confessions to the police. A portion of one of those confessions apparently referred to other crimes, but that portion was not admitted into evidence and is not in the record. Although it seems probable that several of those "other" crimes were committed in connection with the murder, a comment by respondent's counsel in a pretrial conference indicates that one of them involved the same victim's house "a week or two beforehand".[1] The record tells us nothing about the manner in which that specific statement was elicited, the seriousness of the incident, the dates when that or any of the other incidents occurred, or even

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[1] In support of a motion *in limine* respondent's counsel asked the court to exclude his client's confession of crimes unrelated to the offense on trial. He argued that the State had "extracted some confessions regarding 7 other crimes, a burglary second, a robbery first, stealing under, and I think it was a few more for a total of 7. One of the ones Lashley confessed to did involve the same victim's house. It was a week or two beforehand. My motion in limine is asking the Court to sustain my motion of course forbidding Mr. Bauer [the prosecutor] to bring these up." Tr. 425 (Jan. 27, 1982).

whether counsel's description of the statement was accurate. Yet that one vague reference may now explain the Court's willingness to reinstate respondent's death sentence without hearing argument on the merits of the novel and important constitutional question that the case presents. That question is whether the presumption of innocence (uncontradicted in any way by the prosecution) supports an instruction to the jury at sentencing that the capital defendant's lack of a significant criminal history is a factor mitigating against its imposition of the death penalty. The Court acknowledges that the defendant's testimonial assertion of innocence *would* support the instruction, see *ante*, at 5; it fails to recognize that the presumption of innocence does so as well.

The question arises because the record on which the jury relied in imposing the death sentence contains no evidence of any criminal activity by respondent except the serious felony for which he has been convicted and sentenced. Speculation by appellate judges, see *ante*, at 2, about a matter that was neither available to the sentencing authority nor mentioned by the State in its petition in this Court, is not a substitute for admissible evidence presented in an adversary proceeding.[2] Specula-

[2]Although the majority is willing to rely on these unfounded remarks, see *ante*, at 2, the State itself did not present any such evidence at respondent's trial or sentencing, and it has not suggested to us (or to any lower court) that respondent actually committed a single criminal act between his 17th birthday and the murder of his cousin.

As the Court notes, *ante*, at 2, n. 1, respondent argued both that this statement was "[ir]relevant," see *ante*, at 2, n. 1, and that "to admit the statements or written confessions into evidence would be extremely prejudicial . . . ." Motion *in Limine*, Record 143 (Jan. 21, 1982). Respondent was correct, of course, about the improper prejudice that would have resulted from admitting statements about alleged crimes with which he was never charged and on which the State has never relied in arguing that the instruction in question was properly withheld. It is unfortunate that respondent was spared such prejudice in the trial court only to have it reapplied (under the Court's reading of a stray comment in the record) here.

tion about his juvenile record is impermissible; State law prohibits any use of such evidence in adult criminal proceedings.[3] Accordingly, as the case comes to us, the record is silent on the question whether respondent led an entirely blameless life prior to this offense.

Missouri's capital sentencing statute provides that the absence of any significant history of prior criminal activity is a circumstance militating against the imposition of the death penalty.[4] In Missouri, therefore—as in the many States with the same statutory mitigating factor—the jury should be so instructed when the record contains no evidence of any prior record of criminal activity.

The legal basis for the Court's summary disposition of this case is the general rule that a trial judge's instructions to the jury must normally relate to evidence in the record. That general rule, however, has no application to an instruction on the presumption of innocence in an ordinary criminal trial. In my opinion, the general rule

[3]The relevant Missouri statute provides:

"1. No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.

. . . . . .

"3. After a child is taken into custody as provided in section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court *are not lawful or proper evidence* against the child and *shall not be used for any purpose whatsoever in any proceedings, civil or criminal,* other than proceedings under this chapter." Mo. Rev. Stat. § 211.271 (1978) (emphasis added).

[4]Mo. Rev. St. § 565.012.3(1) (1978) (current version Mo. Rev. Stat. § 565.032.3(1) (Supp. 1991)) establishes the following as a statutory mitigating factor:

"The defendant had no significant history of prior criminal activity."

Even if the statute did not so provide, our holding in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), would require that consideration be given to that mitigating factor.

is equally inapplicable in the capital sentencing process when the defendant requests an instruction explaining the statutory mitigating circumstance at issue in this case.

I

It has been settled for almost a century that the presumption of innocence, when uncontradicted, is an adequate substitute for affirmative evidence. In 1895 the Court held that refusing to give an instruction on the presumption of innocence was reversible error, explaining that "this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin* v. *United States*, 156 U. S. 432, 459. A few years later, in his landmark treatise on evidence, Professor Thayer, while noting that a presumption is not itself evidence, concluded:

> "What appears to be true may be stated thus:—
>
> "1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence.
>
> "2. It serves therefore the purposes of a *prima facie* case, and in that sense it is, temporarily, the substitute or equivalent for evidence." J. Thayer, A Preliminary Treatise on Evidence at the Common Law, Appendix B, p. 575 (1898) (hereinafter Thayer).[5]

The presumption of innocence plays a unique role in criminal proceedings. As Chief Justice Burger explained in his opinion for the Court in *Estelle* v. *Williams*, 425 U. S. 501 (1976):

[5]"A presumption may be called 'an instrument of proof,' in the sense that it determines from whom evidence shall come, and it may be called something 'in the nature of evidence,' for the same reason; or it may be called a substitute for evidence, and even 'evidence'—in the sense that it counts at the outset, for evidence enough to make a *prima facie* case." Thayer 576.

> "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:
>
> "'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' *Coffin* v. *United States*, 156 U. S. 432, 453 (1895)." *Id.*, at 503.

The failure to instruct the jury on the presumption may violate the Due Process Clause of the Fourteenth Amendment even when a proper instruction on the prosecution's burden of proving guilt beyond a reasonable doubt has been given. *Taylor* v. *Kentucky*, 436 U. S. 478 (1978). Whether the omission amounts to a constitutional violation in a noncapital case depends on "the totality of the circumstances," *Kentucky* v. *Whorton*, 441 U. S. 786, 789 (1979). In my judgment, the instruction should always be given in a capital case.

That conclusion is not essential to my appraisal of the capital case before us today, however, because the totality of circumstances here included respondent's age, the sentence to which he was subject, and—of special importance—the trial judge's erroneous refusal to prohibit cross-examination about his juvenile record. As Chief Judge Arnold explained:

> "[T]rial counsel made a reasonable effort to introduce [affirmative evidence showing that petitioner had no significant criminal history] but was prevented from doing so by an incorrect ruling of the state trial court. The court told counsel that if she insisted on offering evidence that Lashley had no criminal record, it would permit the state to counter this evidence by showing that petitioner had committed juvenile offenses. This ruling was flatly contrary to state law." *Lashley* v. *Armontrout*, 957 F. 2d 1495, 1500, n. 1

(CA8 1992).[6]

This erroneous ruling by the trial judge unquestionably explains why the record contains no specific testimony about respondent's prior criminal history. Even though due process may not *automatically* entitle a defendant to an instruction that he is presumed innocent of other offenses at the penalty phase of the trial, under *Whorton*, *supra*, the instruction should certainly be given when a trial court error is responsible for the absence of evidence supporting the instruction.

The failure to instruct the jury on the presumption of innocence at the guilt phase of respondent's trial—whether or not respondent had presented any evidence of his innocence—would have been constitutional error requiring reversal of his conviction. Under our holding in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), the comparable refusal in this case was also constitutional error requiring the vacation of respondent's death sentence.[7] The Court of Appeals, therefore, properly set aside a sentence of death imposed by a jury uninformed that the state

[6]The other two members of the panel did not agree with Chief Judge Arnold's opinion that this error constituted "a separate and distinct violation of the principle of *Lockett* v. *Ohio*, 438 U. S. 586 . . . (1978)," 957 F. 2d, at 1500–1501, n. 1, but they did not question his interpretation of state law.

[7]We have made it clear that procedural safeguards constitutionally required at the guilt stage of a capital trial are also required at the penalty stage. *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause"); *Estelle* v. *Smith*, 451 U. S. 454 (1981) (Fifth Amendment privilege against self-incrimination applies at capital sentencing); *Bullington* v. *Missouri*, 451 U. S. 430 (1981) (Double Jeopardy Clause applies at capital sentencing). In *Bullington* we actually considered the same Missouri statutes that regulated *this* respondent's capital sentencing, and held that "[b]y enacting a capital sentencing procedure that resemble a trial on the issue of guilt or innocence, however, Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case'." *Id.*, at 444 (emphasis in original).

legislature had expressly authorized it to withhold that sentence because the defendant had no prior criminal record.[8]

II

The mitigating factor in question corresponds precisely to the presumption of innocence. When the trial record reveals no prior criminal history at all the presumption serves as "a *prima facie* case, and in that sense it is, temporarily, the substitute or equivalent for evidence," Thayer, *supra*, that a criminal defendant is blameless in spite of his indictment, and that even after conviction of one crime, he is presumptively innocent of all other crimes. The State cannot refute the presumption of innocence at the guilt phase of the trial without presenting any evidence that the defendant committed the act for which he was indicted; similarly, it has no basis for objecting to a mitigating instruction on the absence of a prior criminal history if it has done nothing to rebut the *prima facie* case established by the presumption of innocence at the sentencing phase of the trial.[9]

[8]It is true that respondent's claim of constitutional error focused on the trial court's refusal to prohibit cross-examination about his juvenile record and did not mention the presumption of innocence. Similarly, the Court of Appeals relied on the rationale of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), without mentioning the presumption. Nevertheless, our jurisprudence firmly establishes that it is appropriate to *affirm* a judgment on a ground that was not raised below. It is manifestly unjust to *reverse* a correct judgment and to reinstate the death penalty simply because the basis for the judgment was not adequately articulated in earlier proceedings.

[9]As the Court correctly notes, just as we have held generally that refusing to give an instruction on the presumption of innocence is not always reversible error, we have also held as a general matter that a capital defendant may be required to present evidence supporting a requested instruction on a statutory mitigating factor. *Ante*, at 4. We have even held that the State may require a capital defendant to support a requested jury instruction with a preponderance of the evidence. *Walton* v. *Arizona*, 497 U. S. 639 (1990). But we have never held that a defendant with a presumptively clean record must present additional

In this case, as the Court expressly acknowledges, nothing in the record "disturbed the presumption that Lashley was a first offender." *Ante*, at 7. There was no danger that the "jury might conclude improperly that he was a repeat offender." *Ibid.* What was lacking, however, was advice to the jury that Missouri law draws a distinction between first offenders and repeat offenders and provides that membership in one class rather than the other shall be considered a mitigating fact no matter how serious the offense committed by the defendant may be. Failure to advise the jury about the mitigating effect of his status as first offender is just as unfair as the failure to advise the jury that it should consider evidence offered by a defendant "as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." *Penry* v. *Lynaugh*, 492 U.S. 302, 320 (1989) (emphasis in original).[10]

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evidence in support of that record to receive an instruction about it. Whether the presumption that a defendant—even a convicted capital defendant—is innocent of all other crimes is viewed as evidence in his favor or merely as a rule of evidence imposing a burden of proof on the State, it means that the State must offer *something* to disprove it. Because the State in this case offered *nothing* to disprove it, the instruction was constitutionally required.

[10] "We note that the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstances.' Okla. Stat., Tit. 21, § 701.10 (1980). *Lockett* requires the sentencer to listen." *Eddings* v. *Oklahoma*, 455 U. S. 104, 115, n. 10 (1982). "I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is 'purely a matter of semantics,' as suggested by the dissent. *Woodson* [v. *North Carolina*, 428 U. S. 280 (1976)] and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." *Id.*, at 119 (O'CONNOR, J., concurring).

Because "no one is better able than the defendant to make the required proffer," *ante*, at 6, the Court considers it fair to require him to attest to his own innocence of any criminal history before the jury may be allowed to rely on the mitigating circumstance when it considers putting him to death. This suggestion is inconsistent with our refusal to allow the capital sentencing process to burden the defendant's Fifth Amendment privilege against self-incrimination.[11] It obviously would have been constitutional error for the prosecutor or the judge to comment on the defendant's failure to testify at the guilt or sentencing phase of the trial; it is equally wrong to deny him an otherwise appropriate mitigating instruction because he failed to testify.

Admittedly, my analysis of the case enables the respondent to obtain a double benefit from his youth. That he was barely 17 years old when he committed the offense is itself a mitigating circumstance; it also serves to shield any earlier misbehavior from scrutiny when his life is at stake. I believe, however, that such a double benefit is entirely appropriate when a state seeks to take the life of a young person. To deny that benefit undermines important protections that the law has traditionally provided to youthful offenders because of their lesser moral culpability and greater potential for rehabilitation. It is doubly disturbing that the Court act summarily in this case, thus expediting the execution of a defendant who, I firmly believe, should not be eligible for the death penalty at all. See *Thompson* v. *Oklahoma*, 487 U. S.

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[11] The Fifth Amendment privilege against self-incrimination, applied against the States through the Fourteenth Amendment in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), clearly applies at the sentencing phase of a capital trial. *Estelle* v. *Smith*, 451 U. S., at 463 ("Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. See *Green* v. *Georgia*, 442 U. S. 95, 97 (1979); *Presnell* v. *Georgia*, 439 U. S. 14, 16 (1978); *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (plurality opinion)").

815, 830–831 (1988) (plurality opinion).

I respectfully dissent.